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# REPORTS OF CASES

ARGUED AND DETERMINED IN THE

**Courts of King's Bench & Common Pleas,**

FROM

1670 to 1704.



BY THE HON. RICHARD FREEMAN,  
LATE LORD CHANCELLOR OF IRELAND.



SECOND EDITION;

WITH

NOTES, REFERENCES, MARGINAL ABSTRACTS, AND A NEW INDEX,

By EDWARD SMIRKE, Esq.  
OF THE MIDDLE TEMPLE, BARRISTER AT LAW.



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# PREFACE

## TO THE SECOND EDITION.

THE present edition of the First part of Freeman's Reports was undertaken at the request of the publisher, who conceived that a new edition of a book, which has been usually sold for some time past at an immoderate price, would be a work not unwelcome to the profession.

The title page will sufficiently apprize the reader by what means the editor has attempted to render it more useful and more easy of reference.

Notwithstanding the surreptitious manner in which they are said to have been originally obtained and published, and the suspicious character which has consequently adhered to them, the notes of Freeman have been sanctioned by the favourable opinion of the Courts on more than one occasion (*a*). It has, however, been the fortune of this Reporter to be rarely cited. The abridgments of Comyn and Bacon, to which recourse is most usually had, when occasion requires a search into the earlier authorities of the law, contain no notice of the book; the materials of those compilations having been collected before the date of its first publication (*b*). Nor is the editor prepared to affirm that

(*a*) *R. v. Genge*, Cowp. 15. *Burn v. Burn*, 3 Vesey, jun. 580, *n*.

(*b*) Viner, however, has abstracted many of the cases reported by Freeman; a few of them are also referred to in the latter titles of Bacon's Abridgment, which were not included in the original MSS. of the Lord Chief Baron Gilbert.



the reports themselves will be found on perusal to satisfy the expectation, which their high market value, coupled with the commendations bestowed on them, might seem to warrant. Yet, after every fair deduction has been made, they still remain possessed of sufficient merit to entitle them to attention. Although not characterized by fullness, they are by no means deficient in perspicuity; and, as far as a judgment can be formed from a comparison with contemporary reporters, or with the established doctrines of the law at the present day, they seem for the most part to be free from material error or misstatement. Some of the cases, and those chiefly in the Common Pleas, are not to be found elsewhere; but the number of them is not very considerable. A far greater number are to be found nowhere except in books so remarkable for inaccuracy as Keble, or of such apocryphal authority as the Modern Reports. In this view, the Reports of Freeman may be deemed valuable, as tending to throw additional light upon the judicial determinations of the Courts during a period of time illustrated by the names of Vaughan, Hale, North, and Holt.

TEMPLE, *July* 1825.

## PREFACE TO THE FIRST EDITION.



THE following Cases in Law and Equity (*a*), were collected by Richard Freeman, heretofore of the Middle Temple, Esq. during the time of his practice of those two laudable and praiseworthy branches of his profession in Westminster Hall. That his merit, industry, and genius, were great, singular, and conspicuous, will not, nay cannot, be doubted or disputed, much less denied; especially when it shall be known, that his eminent qualities and rare talents introduced him to the friendship and esteem of that truly noble, virtuous, and learned lawyer, statesman, and privy counsellor, the late John, Lord Sommers, who, in the year 1706, had so high an opinion and just judgment of Mr. Freeman's integrity and abilities, as to recommend him to the important office of Lord Chancellor of Ireland, then vacant, in which high post he was deservedly placed by his Sovereign.

THOMAS DIXON.

(*a*) [The CASES IN EQUITY constitute the Second Part of these Reports, and, in the former edition, followed immediately after the First Part, or CASES IN LAW, forming together a single volume, preceded by a dedication and the above preface by the Publisher. A few decisions in equity, (not sufficiently numerous to require to be separately noticed in the title page), are also inserted in the midst of the common law cases contained in the present volume. The notes, and other additional matter which accompany these, are altogether borrowed from the Appendix to Freeman's Equity Cases recently edited by Mr. Hovenden. On referring to pages 301, and 329, the reader will find them distinguished from the rest by a memorandum, which points out the extent of the present editor's obligation as well as the limits of his responsibility. *Editor.*]

The Reader is requested to insert, in their proper places, the following corrections ; as some of the errors, whether they are to be referred to the printer, or to the inaccuracy of the Editor's manuscript, pervert the intended meaning.

In Index to Cases, p. ix. for *Orby v. Lord Moore*, read *Mohun*.

Page 30, note to case 33, last line but one, for *so* read *to*.

— 39, n. 1, to c. 42, line 1, for *7 T.* read *7 T. R.*

— 49, n. 4, to c. 54, line 4, for *their* read *the*.

n. 6, line 7, for *personality* read *personalty*.

— 61, n. 2, to c. 68, after *and* read *it was contended*.

l. 4, dele *rather*.

l. 5, for *than* read *not*.

— 68, in l. 3, of extract from R. L. for *was* read *were*.

— 95, n. 4, l. 1, for *not* read *now*.

— 107, n. 2, to c. 119, l. 15, for *device* read *devise*.

— 137, n. 1, to c. 172, l. 5, for *required* read *received*.

— 177, n. 4, to c. 237, add a reference to *Cork v. Wilcock*, 5 Mad. 331.

— 222, n. 10, to c. 292, l. 3, after *Journ. H. of L.* add vol. 16.

— 270, n. 6, to c. 338, last line, for *this decree* read *the grounds of a previous decree in this cause*.

— 274. The extract from R. L. concludes by *injoining the bishop of the diocese from admitting any clerk, &c.* ; it may be proper to subjoin a reference to *Newdigate v. Helps*, 6 Mad. where any such power of the Court of Chancery is disclaimed.

## A

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## CORRIGENDA ET ADDENDA.

Page 85 The case of *Thomas v. Sorrel*, is also to be found in the Hargrave MSS. in the British Museum; see Ellis's Catalogue, num. 339.

177 In the marginal abstract at the end of C. 189, for *devisor* read *devisce*.

178 In C. 190, line 10 from beginning, for *abbot* read *archbishop*.

203 The name of C. 206 is the *Mayor, &c. of London v. Gatford*.

285 The marginal abstract of C. 328 is not agreeable to the report of Freeman, where the objection is stated to have been, that the plaintiffs did not appear to be churchwardens, *at the time of action brought*. But see Keble's report of S. C.

298 Add the number of this page at the commencement of C. 353.

463 In the margin of C. 633, for *testator* read *intestate*.

515 In the beginning of n. (b), for *further* report read *fuller*.

# CASES

ARGUED AND DETERMINED

IN

KING'S BENCH AND COMMON PLEAS.

DE TERM. S. MICHAELIS, 1670.

IN COMMUNI BANCO.

GOODWIN v. PARKER.—In C. B.

( C. 1. )

S. C. T. Jones, 1.

ROBERT HARISON demise terres al Parker per ans rendant rent et puis Harison grant cest rent al Goodwin le lessee attorne al grant le rent est arere et le grantee port action de debt pur le rent et fuit resolute per Curiam (absent *Vaughan*) q'le action bien gist q' le attornment de lessee ad fair in privity de contract; (*per Archer*) et le case de *Ards & Watkins* fuit cite per ceo. Cro. Eliz. 637, 651 (a). *Per Wild*, Action de debt bien gist pur rent seck per ans (b).

ROBERT HARISON demises lands to Parker for years rendering rent, and afterwards Harison grants this rent to Goodwin; the lessee attorns to the grant; the rent is in arrear, and the grantee brings an action of debt for the rent. It was resolved *per curiam* (*absente Vaughan*) that the action well lies when the attornment of the lessee has made a privity of contract; (*per Archer*) and the case of *Ards & Watkins* was cited for this. Cro. Eliz. 637, 651. *Per Wild*, An action of debt well lies for a rent seck for years.

Grantee of a rent reserved on a lease for years may bring debt against the lessee after attornment.

(a) *Vid.* Gilbert on Debt, p. 386.

(b) S. P. 1 Leon. 315. and *Robins v. Cox*, 1 Lev. 22. T. Ray. 11. 1 Keb. 1, 42, 71, 153, 250. *Brownlow v. Hewley*, 1 Ld. Raym. 82. This grant of the rent separately from the reversion conveyed a rent seck to the grantee. Litt. § 225, 226, 227. At common law such a grant was not good without at-

tornment. Litt. § 551. Finch's Law, 156. *post*, C. 45. By attornment a privity was created, which, in the case of a chattel rent, would support an action of debt. See the principal case, *supra*. But bare attornment on the grant of a freehold rent was not a sufficient foundation for an assize, for which purpose an actual seisin of the rent was,

and still is, necessary, either by payment of parcel of the rent *eo nomine*, or by delivery of money or some collateral thing in the name of seisin. Gilb. Ten. 89. Com. Dig. Seisin, C, D. And it should seem that an assize is the only action for the recovery of a rent seck, where the owner has a freehold interest in it; for the stat. 8 Anne, c. 14, § 4, which gives an action of debt for rent

reserved on a lease for lives, applies only to cases between landlord and tenant. *Webb v. Jiggs & ux.* 4 Maul. & Sel. 113. *Kelly v. Clubbe*, 3 Brod. & Bing. 130. However a distress may be supported for a rent seck by stat. 4 Geo. 2, c. 28, whatever estate the owner may have in it; and attornment is no longer necessary by 4 & 5 Anne, c. 16, § 9, 10.

( C. 2. )

## BUSHELL'S CASE.—In C. B.

S. C. Vaugh. 135. T. Jo. 13. 6 Howell's State Tri. 999.

Petit jurors are not fineable for giving a verdict contrary to the evidence, and the direction of the Court.

12 Mod. 391.

1 Ld. Ray. 470.

21 How. State

Tri. 925. *Post*,

C. 619. 2 Mod.

218, 221.

[ \* 2 ]

2 Swanston

Rep. 54.

See the return

in Vaug. 135-6.

Of the degree of certainty requisite in the return to a *Hab. Corp.*

BUSHELL was impanelled upon an inquest to try an indictment against one *Pen* and *Mede*, upon a tumult and unlawful assembly; and because the jurors did acquit contrary to their evidence, and the direction of the Court, they were fined forty marks a man, and committed till they paid the fine; and upon this *Bushell* brought his *Habeas Corpus*.

It was argued by *Nudigate*, *Sise*, *Waller*, *Broome*, for the prisoners.

*Nudigate* excepted against the return. 1. It is said, the jury were charged to try an issue, and there is no venue \*alleged. 2. No place where the offence was done. 3. It doth not appear that there was any issue joined in this case. 4. It is said upon an indictment before the justices, and it doth not appear that the bill was found *per probos et legales homines*, and cited *Sir William Withpoole's* case. Cro. Car. 134, 147.

But a difference was taken between an indictment and the return of a *Habeas Corpus*, which requireth not so much certainty; and all those exceptions looked upon as immaterial (a). 5. The return is too general; for though it may be objected, that that is but defect in form, yet in this case *forma dat esse*; and cited *Chambers's* case, Cro. Car. 133, 168, and *Specot's* case, 5 Co. 57; Moore, 839.

(a) *Vid.* 5 Term Rep. 170. 2 Leach, 584. But the return was adjudged insufficient; because, among other reasons, "the cause of the imprisonment ought, by the return, to appear as specifically and certainly to the judges of the return, as it did appear to the Court or person authorized to commit." Vaugh. 137. and see *Crowley's* case, 2 Swanston, 82. *Anon.* 1 Vent. 336. However, the language of Ld. C. J. Vaughan, in this case, has been held to be too unqualified, at least with reference to superior courts. *Burdett v. Abbot*, 14 East, 72, 73. and 2 Hawkins, c. 15, ss. 76, 77. It is sufficient if the party appear to be in custody under the sentence of a Court of competent jurisdiction. *R. v. Suddis*, 1 East, 306. In the case of contempts, it seems

that a commitment for a contempt generally by a superior Court is sufficient, and the particulars of it need not specifically appear, and are not examinable by any other Court of co-ordinate jurisdiction. *Burdett v. Abbot*, 14 East, 150. S.C. 5 Dow, 199. *R. v. Davison*, 4 Barn. & Ald. 334, 336, 340. and see *Brass Crosby's* case, 3 Wils. 188. S. C. 2 W. Black. 754. *R. v. Flower*, 8 Term Rep. 314, 325. 2 Hawkins, c. 15, ss. 76, 77; and *post*, *Shaftbury's* case, p. 456. But if the cause of imprisonment specified in the return be clearly and on the face of it contrary to law, the prisoner is entitled to be discharged, although it be a commitment by the House of Commons. *Semb.* 14 East, 150, 151, 161. Vaugh. 156, 157.

6. To the merits of the cause. 1. It is alleged they did acquit him against the law of the land. *Ans.* The Court cannot judge of matter of law, unless the fact be first found. 2. Against full evidence. *Ans.* Perhaps the evidence might not be to the matter, or the jury might not give credit to the witnesses (1). 3. Against the direction of the Court. *Ans.* The direction of the Court cannot bind the jury; antiently the Court have fined jurors for misdemeanors, but never for going contrary to their evidence. 8 Ed. 3, Bro. Fine for Contempt, 42. 4 Ed. 4, 36. *Wats and Braine*, Cro. Eliz. 779. (1) Cro. El. 309, 310. Post, C. 97, 549.

*Wharton's case*, Yelv. 24. *Noy*, 48. *Wagstaff's case* objected.

There is more reason to fine the grand jury than the petty jury, for they are to find the bill upon probable evidence; because it is but in the nature of an accusation, and the party may make his defence, and is not concluded.

If the jury find for the king, no attain lies; otherwise, if they find against him. 10 H. 4. *Obj. De fide et officio judicis non recipitur quæstio, &c. (b).* *Ans.* That makes for the prisoners, for the jurors are judges of the fact. The judges are to open the eyes of the jurors, but not to lead them by the nose (2). Rolle's office of Courts, 523. (2) The words of Ld. Bacon; vid. Fortesc. de Laud. by Amos, p. 199. (3) 2 Inst. 425-6.

*Sise.*—The statute of Westm. 2, cap. 30, is expressly against it; *justiciarii non compellant juratores, &c.* And my Lord Coke says, it extends to matters of the Crown (3); he cited 7 Ric. 2; Fitz. Ab. Corone, 108. The jury shall not be presumed to go contrary to their evidence, for they are under great ties, *sub suo periculo et Dominum habent ultorem.*

And if this Court may inflict these penalties, why not the justices of peace, or the steward in a court leet. If they have done amiss, they ought to be punished by attain; if not, they ought to be discharged, and not punished at all.

\**Waller.*—It is returned, they did acquit him against plain and manifest evidence, and it is not set forth what the evidence was, that the Court might have judged of it. It is contrary to *Magna Charta, nec super eum ibimus nisi per judicium parium*, Fitz. Attaint 664. It will be of ill consequence, by reason of the impression it will have upon jurors, and make them as *ais aio, negas nego*. [ \* 3 ] Vaugh. 137.

*Broome.*—They are charged with two things, 1. In going contrary to their evidence. *Ans.* In that they are judges, and are to satisfy their own consciences. 2. Because they did not pursue the direction of the Court in matter of law. *Ans.* It is possible the Court might mistake the law, or they might mistake the Court, and so no reason it should be so penal.

*Sir William Scrog, pro Rege.*—It is a cause of great con-

(b) As to the extent and application of this maxim, see Bacon's Max. Reg. 17. Vaugh. 138. 14 Vin. Ab. 449.



sequence either way; for as on the one side there may be danger of over-awing the jury, so on the other side a man may be in danger to lose all he hath by the wilfulness of the jury, and have no remedy. It is granted, that in matters of fact only the jury are to be judges; but when the matter of fact is mixt with matter of law, the law is to guide the fact, and they are to be guided by the Court. The jury are at no inconvenience, for if they please they may find the special matter; but if they will take upon them to know the law, and do mistake, they are punishable. *Obj.* The evidence and matter of law ought to be returned, that the Court might judge of it. *Ans.* The return is made by the sheriff, and is not to contain all particulars of the proceeding; and in probability he is not acquainted with every particular. The reputation of the Court is concerned; for here it is suggested, they did not go contrary to law, when the Court saith they did.

*Mainard, pro Rege.*—This fine is a judgment, and it is too late now to come to examine it here, but if it be illegal, it ought to be reversed by writ of error; and he cited *Wagstaff's* case, 17 Car. B.R. (1), which was the very same as this, only he was fined by justices of gaol delivery, but the prisoners here by justices of *Oyer* and *Terminer*. *Obj.* There is another remedy than fining them, viz. by attaint. *Ans.* It is much to be doubted whether an attaint will lie or no; for though the king may have an attaint in case of an information (2), 1 Cro. 309, because the king there is in the nature of a plaintiff, but in an indictment it is otherwise, for that is the complaint of the country.

\**Ellis, pur les Prisoners.*—The return is too general; which was the grievance expressly complained of, 3 Car. c. 1, in the petition of right, that prisoners were remanded where the return of the *Habeas Corpus* was general; and *generale perit in incertitudine*. It doth not appear what the matter of law is, and it is possible the Court might err; the jury are absolute judges of the fact, *et ex facto jus oritur*. Here is no time when the fact was done, and it might be before the act of oblivion for all that appears (3). The power of jurors is very great, for they have *divisum imperium* with the judge, and in that respect Sir Tho. Smith, and other learned men, give the common law pre-eminence of the civil law. If this should be so, the jurors would be in a great dilemma; if they do not appear, they shall be fined; if they do appear, and go according to their evidence, they shall be fined too. The jury in some cases have a greater extent of power than the judges; for the judge is to go *secundum allegata et probata*, notwithstanding his own private knowledge (4), Plow. 83; but if the jury know the falsity of their evidence, they are not bound by it; and for that reason they come *de vicineto*. The judge is bound by estoppels (5), but the jury is not.

(1) S.C. 2 Hale  
H. P. C. 312, c.  
42. 1 Sid. 272.  
T. Raym. 138.  
Hardr. 409.

(2) Dyer, 364 b.  
3 Vin. Ab. 254.  
2 Reeves's  
Hist. E. L. 435.

[ \* 4 ]

(3) Post, C. 97.

(4) Acc. Vaugh.  
147. Vid.  
Wood's Inst.  
Civil Law, p.  
337, 2ded. Bac.  
Tracts, p. 52.  
and Zouch. Quaestiones Juris, p. 503.

(5) 4 Co. 52, *Rawlin's* case.

The jury being in this case liable to an attain; they would be twice charged, for they could not plead this fine. There is a diversity between capital and criminal matters: In capital matters no attain shall lie, *in favorem vitæ*, otherwise in criminals. And if the judges should have this power to fine, it would destroy the antient way of trial by juries, and leave matter of law and fact wholly in the breast of the judge.

*Baldwin, pur les Prisoners.*—The judges cannot fine the jurors for going contrary to their evidence in civil causes, because an attain lies against them; and by the same reason here they being subject to an attain are not finable. The reason of *Wagstaff's* case, why they fined the jurors there, was, because they were not subject to an attain, nor bill of exceptions. 12 Co. 23. Coke says, they are finable in the Star-Chamber (c), which implies they could not fine them in Court. *Wharton's* case passed *sub silentio*, and it was never argued; and it doth not appear that the fine was ever paid.

In *Wagstaff's* case (1) it is probable there were some misdemeanors, because of the inequality of the fine; for ten were fined 100 marks a-piece, and two of them but five marks; and the reasons of *Wagstaff's* case will not make out this case: for the reasons there given were, 1. Because no attain nor bill of exceptions would lie against them (d); but in this \*case it is doubted. But admitting no attain will lie, yet they ought to be fined no more than a judge, when he is mistaken in matter of law, for they are as much judges of the fact, as he is of the law. 2d reason was, because the Court ought to be believed. *Ans.* Inferior Courts ought not to be believed, but ought to certify the special matter, as well as a Bishop. 3d reason, because it was a judgment. *Ans.* It is no judgment, neither hath it the language of a judgment, for all judgments are *ideo consideratum est* (2) *per Curiam*; and so no writ of error lies. For the respect that the law bore antiently to jurors, see the Mirror of Justices, 296 (3).

*Powis, pro Rege.*—He did a little question the jurisdiction of this Court, because the matter is wholly criminal (4). A fine for a contempt in Court is a judgment *ore tenus*, and ought to be reversed by writ of error (e). Every Court is

(c) But the power of fining for this cause even in the Star Chamber was questioned, *vid.* Vaugh. 152. 1 Ld. Raym. 470. Hudson's Treatise, in 2 Collect. Jurid. 72, 112, 153, 206. 1 Grey's Debates, 407. 1 Hawkins, c. 72, s. 5. Hobart, 114. Smith's Commonwealth, b. 3, c. 1.

(d) As to bills of exceptions in criminal cases, *vid.* Buller, N. P. 316. Willes, 535. 1 Phil. Evid. 304, 305, 4th ed. 3 Evans' Coll. Stat. 341, 342, notes, 2d edit.

(e) That no writ of error lies on summary proceedings, such as commitments for contempts, in which there are no pleadings, nor any formal judgment,

see *Wagstaff's* case, Hardres, 409, 410. *Hammond v. Howell*, 2 Mod. 218. *Groenvelt v. Burwell*, 1 Ld. Raym. 470. *R. v. Dean & Chap. of Dublin*, 1 Stran. 540, 543. 8 Mod. 29. Fortescue, 173. *R. v. Inhab. of Seton*, 7 Term Rep. 373. In such cases the writs of *Habeas Corpus* and *Certiorari* are in the nature of a writ of error. *Per Hale* in *Bushell's* case, 1 Mod. 119; and see *Anon.* 1 Vent. 336. 1 Hale H. P. C. 584. In *Bethell's* case, 1 Salk. 348, it is said that "before *Bushell's* case, no man was ever by *Habeas Corpus*, without writ of error, delivered from a commitment of a Court of Oyer and Terminer."

Fitz. Nat. Brev. 60, 64, 107. Cro. Eliz. 309.

(1) Vaugh. 153.

(2) Co. Lit. 39 a. 1 Stra. 540, 543.

(3) See same book, p. 215, 248, ed. 1768.

(4) Post, C. 230, & note, *ibid.*

(1) *Specot's*  
case, 5 Co. 57.

intrusted with the affairs of the Court, and need not to certify the special matter. This case differs much from the return of a Bishop (1); for there the matter is traversable, but not here. If they were not finable, here would be a failure of justice. 1. Because no new trial can be granted in criminal matters, as was resolved 5 Car. B. R., *The King v. Pen-nick & Holt* (f). 2. An attaint will not lie; where twenty-four jurors, (viz. grand jury and petty jury) do find the party guilty, no attaint will lie. (No precedent but 10 H. 4), (g) Fitz. 60, 64. If an attaint would lie, yet the King may have his election. Admitting that inferior Courts might fine, here would be no inconvenience; for if it were unreasonable, the record might be removed by *certiorari*, and so remedied; but this is in a Court of *Oyer* and *Terminer*, which cannot be granted but before the justices *del un banc ou l'auter*. Nat. Brev. 110, 111. Authorities cited, 8 Assis. Fitz. Coron. 108; Stowe's Chron. 624; Bendl. 153.

*Puis in Mich. Term Vaughan* delivered the opinion of the greatest part of the judges, who had conferred together concerning it, that the prisoners ought to be discharged; for the reason given (*ut audiui*) was, because the jury may know that of their own knowledge, which might guide them to give their verdict contrary to the sense of the Court (h).

(f) No new trial can be granted in capital cases. *R. v. Mawbey*, 6 Term Rep. 638. 13 East, 416, n. (b). Nor in cases of misdemeanor, where the defendant is acquitted on the merits. *R. v. Mann*, 4 Maul. & Sel. 337. *Vid. R. v. Inhab. of Wandsworth*, 1 Barn. & Ald. 63. But it is otherwise after conviction for a misdemeanor. *R. v. Mawbey*, *ubi supra*; and *vid.* 4 Bl. Comm. 361.

(g) It is said by Ld. Hale that the King may have an attaint on a verdict of acquittal upon an indictment; for in this case the grand and petit juries dissent. 2 Hale H. P. C. c. 42, p. 310; and *vid.* 4 Bl. Comm. 361. But the better opinion seems to be, that no attaint lies in criminal matters. 1 Hawk. c. 72, s. 5. 1 Ld. Raym. 469. *Vaugh.* 146. See the reasons assigned, *Hawk. ubi supra*. Barrington's Obs. on Stat. 101, 102, 459, n. and 1 Term Rep. 535, *arguendo*. Perhaps the most satisfactory reason is, that the writ was unknown at common law, except in assizes, and that no statute has since extended it to pleas of the Crown. See *Vaugh.* 146. 3 Bl. Comm. 402, 403. 2 Reeves's Hist. of Eng. Law, p. 118. *Sed vid. contra*, 2 Inst. 130, 237. Bro. Attaint, pl. 42. Jenk. 89. Finch's Law, p. 485. Although the writ of attaint is become "a mere sound" (1 Burr. 393) in practice, yet its operation is still visible in pleadings. See instances in Gilbert's C. P. 61,

139, 127, 128. And it is the ground on which a writ of inquiry is in many cases refused for supplying a defective verdict. 2 Wils. 367. 3 Brod. & Bing. 297.

(h) See the judgment of the Court reported at large in *Vaughan*, in which the ministerial and judicial functions of the jury are distinguished, and their verdict is referred to the latter capacity. Agreeably to this decision, it is now settled, that (with the exception of the proceeding in attaints) jurors are in no way questionable for their finding either by summary process, indictment, or action. 2 Hale H. P. C. c. 22 & 42, p. 159, 309. 4 Bl. Comm. 361. 1 Hawkins, c. 72, s. 5, and c. 69, s. 5. 2 Hawkins, c. 22, s. 20. *Floyd v. Barker*, 12 Co. 24. Com. Dig. Action upon the Case for Conspiracy, B. See further on the fining of jurors, *Throgmorton's case*, 1 Howell's State Tri. 901. 2 Rapin's Hist. Eng. p. 38, folio. *Lilburne's case*, 5 Howell's State Tri. 445. Proceedings and Resolutions in Parliament on *Keeling's case*, in 4 Hatsell's Preced. and 1 Grey's Debates, 62, 67, 406. 2 Keble, 180. Hargrave's Pref. to Hale's Jurisdiction of the Lords, p. 98, note; and notes in 6 Howell's State Tri. 992. 1 North's Life of Ld. Guilford, p. 123-4, 2d edit. For observations on *Bushell's case*, and on the separate provinces of the Court and jury, see Hargr. Co. Litt. 155 b., note 5. *Eanomus' Dial.* 3, s. 53. Upon the dis-

charge of the jurors in consequence of the above decision, actions of trespass and false imprisonment were brought against the judge and other parties concerned in the commitment; but they were defeated by the same principle which had been held to protect the jurors themselves, viz. the immunity which belongs to a judicial character; and the Court declared, "that the bringing such an action was a greater offence than the fining of the plaintiff." 3 Kebl. 322, 358. 1 Mod. 119, 184. 2 Mod. 218. 2 Lutw. 1561-2.

With respect to the private knowledge

of the jurors, on which the decision in the above case partly rests, although it appears to have been antiently almost the only evidence required; *vid.* 2 Reeve's Eng. Law, 270, 271; the doctrine is now treated as exploded. 3 Bl. Comm. 374, 375. Andrew's Rep. 321. *R. v. Sutton*, 4 Maul. & Sel. 532. If therefore a juror is in possession of any material evidence, he ought to be sworn as a witness, and disclose it openly in Court. 3 Bl. Comm. 375. 1 Salk. 405. *Smith v. Hollings*, cited 6 Howell's State Tri. 1012, n.

[ 6 ]  
( C. 3. )

### WALKER v. HORNER.—In C. B.

THE defendant was sheriff of Somerset, and an *exigent* being awarded against the plaintiff, the plaintiff sues out a *supersedeas*, and delivers it to the defendant, who allowed it, and received his fees, but notwithstanding outlawed the plaintiff; and afterwards he was taken by a *capias utlagat*. in Dorsetshire, where this action was laid; and it was objected by *Nudigate*, that he ought to have laid his action in Somersetshire, where the wrong was done, or else in Middlesex, where the record lay; but it was resolved *per curiam*, that he had his election to lay it in either; and that he had well laid it in Dorsetshire, inasmuch as he was there taken by the *capias utlagat* (b). Resolved also, that *licet* was a sufficient averment (c).

The sheriff of A. outlaws plaintiff after a *supersedeas* to the *exigent*, and plaintiff is taken on a *cap. utlag.* in county B., an action lies against the sheriff (a), which may be laid in A. or B., or in the county where the record lies. *Licet* is a sufficient averment.

(a) In the margin of the original edition this is said to be an "action on the case." See *Withers v. Henley*, Cro. Jac. 379. Bac. Abr. "Supersedeas," H.

(b) 21 Vin. 89. *Post*, p. 191. 1 Brownl.

13. *Bulwer's case*, 7 Co. 1. 4 Barn. & Ald. 175-6.

(c) On the word "*licet*," in pleading; *vid.* *Buckley v. Thomas*, Plowd. 125. 1 Saund. 117 a. n. (4), by Serjt. Willms.

### NELSON v. NELSON.—In C. B.

( C. 4. )

DEBT for 80*l.* upon an obligation: the defendant pleads a foreign attachment in London, according to the custom; judgment for the plaintiff; but otherwise it had been, if he had pleaded a recovery by foreign attachment (a). If an action be depending in an inferior Court for the same debt, it cannot be pleaded here; but if there be a recovery and judgment, it may (b). *Per Wild.*—A *nolle prosequi* entered

Foreign attachment is no bar without a recovery. Pendency of action in inferior Court not pleadable: *aliter* of a recovery there. Cro. El. 101, 157. *Post*, C. 72. Latch, 208. 5 Co. 62.

(a) It is no bar without execution. *Dyer*, 83 a. *Wetter v. Rucker*, 1 Brod. & Bing. 491. Foreign attachment pending before the writ purchased is said to be pleadable in abatement. *Brook v. Smith*, 1 Salk. 380. Acc. 3 Kebl. 627.

*Vide Nathan v. Giles*, 5 Taunt. 558. *Smidt v. Ogle*, 6 Taunt. 74.

(b) That the pendency of an action in inferior Court is not pleadable in abatement, *vid.* *Sperry's case*, 5 Co. 62. *Thel. Dig.* lib. 11, c. 39, a. 40. *See*

*Nolle pros.* in inferior Court is a bar.

in the Court at St. Albans, in an action for the same debt, was pleaded in an action brought in the King's Bench, and held good, because it was in the nature of a release (c).

v. *Turner*, 2 Ld. Raym. 1102. *Brinsby v. Gold*, 12 Mod. 204. *Dudfield v. Warden*, Fitzgib. 313. But see the observations in the last case, and *Atkinson v. Woodburn*, 2 Lev. 93. Robinson's Entries, 222; and generally 16 Vin. 144. *White v. Willis*, 2 Wils. 87. As to a recovery in such a Court, *vid. Sparry's case, supra.*

*Atkinson v. Woodburn, supra.* *Mico v. Morris*, 3 Lev. 234. Kitchen. 364, edit. 1653.

(c) On the effect of a *nolle prosequi*, *vid. Cooper v. Tiffin*, 3 Term Rep. 511. 1 Saund. 206 a. n. by Willms. 2 Lill. Pr. Reg. 280, 282, 2d edit.; and *Este v. Broomhead*, 3 Esp. 261.

( C. 5. )

GOODWIN v. WICKINS.—In C. B.

Non-joinder of co-executor as defendant, must be pleaded in abatement, and cannot be moved in arrest of judgment,

[ \* 7 ]  
though it appear on the declaration.

Stat. of Limitations is no ground of motion in arrest of judgment. Nor is an action of debt against executor on a simple contract.

20 H. 6, 25.

Two executors were possessed of a term for years, rendering rent; the rent is in arrear for four years since the death of the testator; the plaintiff brings an action of debt against the defendant one of the executors, and declares, that he *simul cum* the other did occupy the term, &c. the defendant pleads *nil debet*, and the issue is found for the plaintiff. It was moved in arrest of judgment, that the plaintiff could not have judgment, because by his own \*shewing there were two executors, and he had sued only one of them. It was answered by the Court, that now he comes too late, and hath pretermitted his time; for he might have pleaded it at first, and demanded judgment whether he should answer, but now the jury have found him a debtor *modo et forma*, and he hath lost the advantage (a); and compared it to the Statute of Limitations; if it be not pleaded, it shall not be moved in arrest of judgment (b); and so if an action of debt be brought against an executor upon a simple contract of the testator, and he appears and pleads *nil debet*, and found against him, the plaintiff shall have judgment, because he hath dispensed with his advantage (c).

(a) *Vid.* 1 Saund. 154, n. (1), by Willms. *Ibid.* 291 b. n. (4); and the case of *South v. Tanner*, 2 Taunt. 254. *Mainwaring v. Newman*, 2 B. & P. 124, n. (b).

(b) *S. P. Cro. Car.* 163, 381. Serjt.

Willms. note to *Hodsdon v. Harridge*, 2 Saund. 63.

(c) Acc. Thel. Dig. lib. 4, c. 9, s. 3. Plowd. 182. *Edgecomb v. Dee*, Vaugh. 97. *Prince v. Nicholson*, 5 Taunt. 665.

( C. 6. )

KING v. GERVAISE & HINCKLY.—In C. B.

S. C. Vaugh. 53. T. Jo. 8. 1 Mod. 276.

A traverse upon a traverse cannot be taken by a common person; acc. *Bennet v. Filkins*, 1 Saund. 22, and notes *ibid.* by Willms.

THE case was shortly this: the king brings a *quare impedit*, and suggests a title; the defendant makes a title, and traverses the king's title; the king doth not in his replication maintain his own title, but traverseth the defendant's title; and the defendant demurs; and adjudged against the king by *Vaughan*, *Archer* and *Wild*, (*Tyrrell* dissenting). By *Vaughan*: if it were in the case of a common person, the



books are clear, that he cannot take a traverse upon a traverse: for these reasons, 1st, If you will recover any thing from another, you must not only destroy the defendant's title, but you must make your own better than his; for you must not recover by the weakness of his title, but by the strength of your own. 2nd, If the plaintiff should make it appear that the defendant's title is not good, and make no title for himself, the Court could have no inducement to give judgment for him *quia in æquali jure melior est conditio possidentis* (1). 3rd It would be to no end for the plaintiff to set forth any title at all, if he can force the defendant to make out his title (2), and is not bound to make good his own; and these reasons hold as well in the case of the king as of a common person (3). Hob. 102, *Digby v. Fitsherbert*. The inconvenience would be very great, if the king had this liberty; for if the king or his predecessors have presented by reason of lapse, wardship, or by having the temporalities of a bishop in their hands, &c. when the church voids by the death of the presentee, by lapse, &c. if the king bring his *quare impedit*, and counts \* of the last presentment, and suggests a title; the defendant says he presented by lapse; if the king might now leave the defence of his own title, and compel the defendant to make good his, it would be very inconvenient, and by that means all the incumbents in England might be disturbed, and the patrons forced to set out their titles (4). And this diversity was agreed by the three Judges: where the king is in possession, or else hath a title appearing by matter of record, as by office found, &c. there he may waive his own title, and traverse the defendant's title, and shall not be bound to maintain his own, but may take a traverse upon a traverse. Bro. Prerog. 116; Stamf. Prerog. 62, 64; 8 H. 8. Keil. 192 (a).

nor by the King; unless he be in possession, or his title appear by matter of record, when he may either maintain his own or traverse defendant's title.

(1) Hob. 103. Vaugh. 60.

(2) Post, p. 34, C. 43.

(3) 2 Stran. 1011.

(4) Vid. Vaugh. 61.

\* 8

(a) The argument of Vaughan, C. J., is to be found in his report of the case; and those of Archer, Wild, and Tyrrell, in 1 Mod. Rep. *ubi supra*. Vid. Com. Dig. Plead. G. 17, 19, and 3 I. 10. Id. Prerog. D. 85. 17 Vin. Presentation, B. d. 16. *Thrale v. Bishop of London*, 1 H. Black. 376.

## DE TERM. PASCHÆ, 1671.

IN BANCO REGIS.

9

WARREN'S CASE, *sur l' Estatute* 13 & 14 Car. 2, c. 12 ( C. 7. )

WARREN an inhabitant of Tuen came to Stevenage; the inhabitants within forty days complain to a justice of peace according to the statute, but do not prosecute it for five months. *Qu.* Whether this was a good settlement that the party cannot be removed. *Res.* That the party need not be removed within the forty days; but it is a disturbance, if com- Forty days' residence will not give a settlement under 13 & 14 Car. 2, if there be a complaint within that time fol-

lowed by a recent prosecution (a).

plaint be made within that time, so that there be *recens prosecutio*.

*Qu.* What time shall be allowed for the prosecution. *Res.* It must be in convenient time; and *per Twisden*, five months is time enough. *Rainsford* and *Morton contra; absente Hale*.

(a) See the statutes 1 Jac. 2, c. 17. 3 & 4 W. & M. c. 11. & 35 Geo. 3, c. 101. By the last statute, a settlement by mere residence and notice is in effect abolished. *Vid.* 1 Bl. Comm. 363.

( C. 8. )

SMITH v. WHEELER. *Bre' d' error in B. R.*

*J. C.* 1 Vent. 128. 1 Lev. 279. 1 Mod. 16, 38. 2 Keb. 564, 608, 644, 763, 772. 1 Hale. H. P. C. 246.

A power of revocation and new appointment by writing under the hand, &c. of the donee, is not forfeited by

[ \* 10 ] his attainder for high treason.

The goods of an executor, as such, are not liable to forfeiture. *Acc.* 2 Hawk. P. C., c. 49, s. 12.

SIMON MAINE possessed of a term for eighty years assigns to Croke and Becke, in trust that they should permit him to receive the profits during his life, and after his death to go to the payment of several debts, &c. proviso that it should be lawful for the said Simon Maine, by writing under his hand, &c. to revoke the said uses, and limit new. Simon Maine, being one of the King's Judges, \* was attainted of treason *per stat.* 12 Car. 2, whereby (*inter alia*) it was enacted, that he should forfeit all trusts. *Qu.* Whether this power of revocation was given to the king, it being *quasi* a trust, as was objected, because the party had *jus disponendi*: but resolved *per curiam*, that it is no implicit trust, nor forfeited by this attainder; for by the death of Simon Maine the proviso is determined; and there is no means to alter the old trust, for it was inseparable to the will of Simon Maine; and no man can know his will but himself; and here could be no trust to him but during his life, for the whole trust was executed till revocation. *Obj.* Here the party hath *jus disponendi*. *Ans.* That doth not create a trust; for then an executor might as well forfeit that which he hath as executor, without a devise of *residuum bonorum*, for there he hath *jus disponendi*, and yet none will say that he can forfeit them. *Latch.* 25, *Warner* and *Harding*, 7 Co. *Englefield's case* (a).

(a) The words in the act of attainder upon which this case was decided, are similar to those of the stat. 33 Hen. 8, c. 20. 1 Vent. 129. The distinctions established by the above case, and by those which are cited therein, seem to be, that a power inseparably annexed to the mind or person of the donee is not forfeited; but where the execution of it is an act merely formal, which may be done as well by one person as by another, as the mere tender of a ring or of money, the benefit of the power passes

to the Crown, and it may be executed at any time during the life of the original donee. 1 Hale H.P.C. 244, 245, 246. Sugden on Powers, c. 4, s. 2, p. 171, 2d edit.

It appears in the other reports of this case, that the settlement was objected to on the ground of fraud, but the Court declined the consideration of this, because it was a question for the jury alone. As to this point, *vid.* 4 Bl. Comm. 387-8. 13 Vin. 554, *Fraud*, L. a. *Shaw v. Bran*, 1 Stark. 319.



## DE TERM. S. TRINITATIS, 1671.

IN COMMUNI BANCO.

GARDINER v. SIR JOSEPH SHELDON.

( C. 9. )

&amp; C. Vaugh. 259. 2 Kebl. 781. 1 Ab. Eq. 197.

WILLIAM ROSE seised of land in fee devises, that if his son and his two daughters should die without issue, that then his nephew should have it, &c. *Res.* That if the son and daughters take any estate by the will, they must have joint estates for their lives, and several inheritances; for they cannot take in succession, because of the uncertainty who shall take first (a).

*Res.* By three justices, (*Tyrrell contradicente*) that the son and daughters shall take no estate by implication: for, *per Vaughan*, the heir shall never be disinherited by an implication, but where it is a necessary, and not a possible or constructive implication (b). By a necessary implication is intended such an implication without which the estate cannot be taken at all; as 13 H. 7, 17. A man devises, that after the death of his wife his heir shall have his house; here the wife must take an estate by necessary implication; for if she does not take, no body at all can, being it is the express intent of the testator, that the heir shall not have it till after the death of the wife.

*Tyrrell* took this difference, that if an estate be devised to A. after the death of a stranger, there the stranger shall take nothing; but if it be after the death of his wife or child, &c. then they shall take by implication, because they are persons that he is bound to provide for.

\*An express devise of a chattel shall not hinder the taking of an estate in land by implication; and so although there be an express devise of land, it shall not hinder taking of an estate by a necessary implication (c).

*Per Vaughan*: The heir shall have a base fee determin-

A. seised in fee, devised, that if his son and two daughters should die without issue, his nephew should have the land. Held that the son and daughters took no estate by implication; that a base fee descended to the heir, determinable on the failure of the issue of himself and his sisters, and that the nephew took by way of executory devise. The heir can only be disinherited by necessary implication.

Godb. 16.

T. Raym. 454. Willes, 373.

[ \* 12 ]

Post, C. 104, &amp; p. 164. 1 Rol. 834. 2 Cro. 75.

Bro. Devise, pl. 52. Vaugh. 263.

(a) See Vaugh. 261. *Windsore v. Hobart*, Hob. 313. and Litt. s. 283-4. Co. Lit. 182-184.

(b) See Vaugh. 262. Post, C. 476 b. and C. 625. Bac. Abr. Devises, (G). 1 Saund. 184, a. n. (5); and *Roe v. Somerset*, 2 W. Black. 692. *Trent v. Hanning*, 7 East, 97. *Right v. Compton*, 9 East, 267. "Necessary implication means, not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed." *Per* Ld. Eldon in *Wilkinson v. Adam*,

1 Ves. & B. 466. And see *Boote v. Blundell*, 1 Meriv. 209. *Moore v. Heastman*, Willes, 140-1.

(c) i. e. An express devise shall not preclude the devisees from taking other land by implication under the same will. Vaugh. 263, 266, 268. Bac. Abr. Devises, (G). As to the cases in which a particular estate, devised in express terms, will or will not be enlarged or qualified by implication, see 2 Fonb. Treat. of Eq. B. 2, c. 3, s. 2, note (h), p. 55, 5th edit. and Bac. Abr. *ubi supra*. Post, C. 189. *Doe v. Wrights*, 2 Barn. & Ald. 710.

able upon the dying of him and his two sisters without issue, and the nephew shall take by way of executory devise. *Obj.* That if the nephew shall take by way of executory devise, this will be the way to raise a perpetuity, for then it cannot be docked by him that has the preceding estate. *Ans. Per Vaughan.*—There is no law against perpetuities absolutely, but against intails of perpetuities (d).

(d) But it seems that the executory devise, being limited upon a general failure of issue, is void for remoteness. See Bac. Abr. Devises, (J). Com. Dig.

Devise, N. 17. 12 Mod. 281-2. Gilb. on Devises, 55, where this case is cited with disapprobation. And see generally Fearn. Ex. Dev. c. 3.

( C. 10. )

ALDER v. PUISY.—In SCACC'.

*Habeas Corpus* lies to remove a prisoner in execution within the cinque ports.

See 31 Car. 2, c. 2, s. 11.

The cinque ports have no privilege against the King.

(1) Dy. 297, pl. 24.

Lands within the cinque ports may be seized in case of outlawry, and extended upon judgments.

THE defendant was in execution at Dover for 1000*l.* recovered against him in the Court at Dover; the plaintiff brings a *quo minus* against him in the Exchequer for a debt of 100*l.* and sued out a *habeas corpus* to the constable of Dover to bring the body of the defendant: the constable upon the return set forth the privilege of Dover, being a cinque port town; but that return was disallowed of; because there is no place privileged in this kind, but that the king may send his writ to have an account of his subjects, though it be privileged as to actions between party and party (a). It was prayed by Sir Edward Thurland, the Duke of York's attorney, that the prisoner might be remanded, because those debts which were recovered against him at Dover might otherwise be lost. But it was denied by the Court; for when he is committed here, he is charged as well with the judgment that he was in execution for at Dover, as for those that are recovered here; and if the warden discharge him before the satisfaction of those debts, he is liable to an action (1). And by Windham, If a man be outlawed, his lands within the liberties of the cinque ports may be seized into the King's hands, and may also be extended upon judgments.

*Vid.* 4 Inst. 223. 3 Leon. 3. 1 Lill. Prac. Reg. 385. *Post*, p. 148, C. 168. Harg. Tracts, 113.

(a) Acc. 1 Mod. 20; *sed vid.* 1 Sid. 166, 431. That there is no privilege against the king's process. See Cro. El. 911. *Bourn's case*, Cro. Jac. 543. 3 Black. Comm. 79. Gilb. C. P. 27, 28. *Post*, C. 111, 168. And the King's debt or partakes of the prerogative, for a *quo*

*minus* runs into the cinque ports. *Williams v. Lister*, Hard. 475; and see *Carrett v. Smallpage*, 9 East, 330. See further, on the privileges of the cinque ports; Harg. Law Tracts, 106, 113.

## THOMSON v. FOKES.—In C. B.

( C. 11. )

TRESPASS. The defendant pleaded, that it was committed within the liberty of the Cinque Ports, and sets forth the privilege of the Cinque Ports. The plaintiff \*demurs, because he does not say that he was an inhabitant there; and judgment against the defendant; for if this plea should be admitted to be good, then trespasses committed within the Cinque Ports by one that lived out, or would presently absent himself, would be dispunishable (a); and the reason of the privilege of the Cinque Ports is, that the inhabitants there, who are to defend the port towns, should not be drawn away; which does not extend to strangers. *Done v. Rogers* in B. R. was cited by *Wild*, where an action of trover was brought for taking corn off land, with an intent to try the title of the land lying in the county palatine. Resol. That the action well lay.

Plea of privilege of the

[ \* 13 ]

cinque ports must aver that defendant was commorant there.

Cro. Car. 150.

1 Sid. 66.

4 Inst. 213.

(a) *Vid.* 2 Inst. 557. Yelv. 13. Com. Dig. Abatement, D. 3.

## GARTER v. DEE.—In C. B.

( C. 12. )

THE defendant being sued as administrator, pleaded, that before the date of the writ his administration was revoked and granted to another. *Per Wild*:—He ought to have set forth that he had fully administered all the goods in his hands, or else that he had delivered them over to the new administrator (a); for otherwise the debtee might be at a loss; for those goods shall not be assets in the hands of the new administrator till they come into his possession (1). *Per Vaughan*:—The bare possession of goods shall not make a man executor of his own wrong, unless he doth undertake to do some acts which none but an executor can lawfully do; as to release the debt of the testator, &c. (b).

How defendant (administrator) shall plead, when the administration is revoked and granted to another.

(1) Com. Dig. Assets, D.

Bare possession of goods shall not make an executor *de son tort*.

(a) Latch. 267. 1 Kebl. 114. Hob. 49. 1 Mod. 63. Cro. Car. 88-9. *Post*, C. 144. And if he have delivered them over before action brought, *plene administravit* seems to be a proper plea. *Post*, C. 171. 1 Salk. 313. *Padget v. Priest*, 2 Term Rep. 97. *Curtis v. Vernon*, 3 Term Rep. 587. An administrator, defendant, may plead that *pendente brevi* administration was committed to another. Bro. Ab. Administ. pl. 3.

(b) Whether bare possession of goods will make an executor *de son tort*, see *Read's* case, 5 Co. 34. Wentv. Office of Executors, c. 14, 175-7, edit. 1763. Dyer, 105 b. 166 b. 2 Brownl. 183. *Post*, C. 172, p. 152. *Mountford v. Gibson*, 4 East, 448. *Femings v. Jarrat*, 1 Esp. 335. And see Swinb. 470-472. 1 Sal. 313. Godolph. Orph. Leg. 101. Shepp. Touchst. 488. 2 Leon. 223-4.

## DE TERM. S. MICHAELIS, 1671.

IN BANCO REGIS.

( C. 13. )

BROWNE v. LONDON.

S. C. 1 Vent. 152. 1 Lev. 298. 1 Mod. 285. 2 Kebl. 695, 713, 758, 822.

*Indebitatus assumpsit* will not lie upon a bill of exchange against the acceptor. 2 Lutw. 1594.

Cro. Car. 302.  
Cro. Jac. 306.  
Cro. Eliz. 155.  
1 Rol. 7.

RESOLVED, that an *indebitatus assumpsit* will not lie upon a bill of exchange accepted, merely. If A. delivers money to B. to pay over to C., and B. doth not pay it over; A. may have an action of debt as for money lent(a); or if A. and C. contract for goods, and A. deliver money to B. to pay to C., C. may have an action of debt as for money received to his use(b). *Per Hale, C. J.*—But an *assumpsit* will lie, and the party may give the acceptance of the bill in evidence. *Het.* 167(c).

(a) *Vid. Core's case*, Dyer, 20 b.

(b) Acc. 1 Rol. Ab. 7, 597. Cro. Jac. 687. *Whorewood v. Shaw*, Yelv. 25. Gilb. on Debt, 362. *Rast. Entries*, 159. *Post*, C. 328, 646. *Cramlington v. Evans*, 2 Vent. 210. *Dutton v. Poole*, 1 Vent. 318, and *post*, p. 471. And see *Company of Beltmakers v. Davis*, 1 Bos. & Pul. 101, n. (c). *Piggott v. Thompson*, 3 Bos. & Pul. 149, n. (a). *Israel v. Douglas*, 1 H. Black. 239. Com. Dig. Action upon the case upon Assumpsit, E. *Flewelin v. Rave*, 1 Bulstr. 68. *Surtees v. Hubbard*, 4 Esp. Ca. 204. *Wilson v. Coupland*, 5 Barn. & Ald. 228.

(c) *Vid. Corderoy's case*, *post*, p. 313. *Thompson v. Morgan*, 3 Camp. 101. *Anonymous*, 12 Mod. 345. *Hodges v. Steward*, 1 Salk. 125. *Brown v. London*, 1 Vent. 153, *per Twisden, J.* *Priddy v. Henbrey*, 1 Barn. & Cressw. 674. and *Bayley on Bills*, 285, 4th edit. When

a bill or note, not being expressly declared upon, is offered in evidence to support a general count, it does not possess the peculiar privileges of those mercantile instruments, but is merely regarded as a writing or admission by the party charged, from which the jury may infer the truth of the matter alleged in the count. *Story v. Atkins*, 2 Stra. 725. *Gibson v. Minet*, 1 H. Black. 602. Nor is such evidence generally available at all, unless there be some privity between the plaintiff and defendant, as where they are immediate parties to the bill, or an express promise has been made by the defendant. *Eron v. Russell*, 4 Maul. & Selw. 507. *Waynam v. Bend*, 1 Camp. 175. *Thompson v. Morgan*, 3 Camp. 101. *Johnson v. Collings*, 1 East, 98. *Wells v. Girling*, *Gow's Ni. Pri. Rep.* 22, and note, *ibid.*

( C. 14. )

KING v. SIR EDWARD LAKE.—In C. B.

S. C. 2 Vent. 28. 1 Vin. 461.

Words defaming a counsellor in his profession are actionable.

THE plaintiff declared, that, he was a counsellor at law, and in good repute, &c., and that the defendant did scandalously and maliciously write a letter to the Countess of Lincoln, his client, *ubi inter alia continebatur*, "Mr. R. advises you to a vexatious suit, and he will make you pay double and treble fees, is a griping lawyer, and he will milk your purse to fill his large purse, &c.," and laid, that thereby he lost his clients, &c. *Wild.*—It is a general rule, that where one's life may be brought in question, the words are action-

able; as to call a man thief; and the law takes care of a man's livelihood and fame, as well as of his life (a).

\*To say of a lawyer, that he is a promoter of vexatious suits; or, that he is a corrupt person; or, that he is an ignorant person; or, that he is a dunce; actionable. *Per curiam*.—Or, that he gives bad counsel, it is actionable. *Per Tyrrell*.—Or, that he is a griping lawyer, and will milk your purse; actionable. *Per Wild*.—Or, that he will spin out your case, do not go to him; actionable. To say of an attorney, that he is a maintainer of suits; or, a barretor; or, a bribing knave; or, a champertor; all actionable, because they touch him in his profession (b). [ \* 15 ]

Hob. 8, *Boas's* case.

Words shall be taken in *mitiori sensu*, but it must be to a common intendment (c); as to say a man is a murderer, it may be of hares; but it shall not be intended, unless the circumstances do evince it, as the discoursing of hares (1): "you stole my cock," actionable; it may be he meant a pheasant cock, and so not felony; but it shall not be intended so, but a tame cock, unless the circumstances do demonstrate it. *Per Wild*.—Such a one had the use of her body, actionable, adjudged in the *Lady Morris's* case (2), (alleging that she lost her marriage). *Per Tyrrell, Archer and Wild*, judgment was given for the plaintiff. But *Vaughan* was of a contrary opinion; for he said, if actions should be allowed for such slight defamations, it would take away all communication; as if a man ask me whether such an inn be a good inn, or whether such a tavern hath good wine; if I tell him no, the inn-keeper or vintner will presently have an action on the case (3): he said there are certain idioms which are understood by every body; as to say, such a one is brought to bed; or, such a one had the use of her body; and in these cases it is all one as if the party had expressed himself in other terms; but to say he will milk your purse, is none of these (d).

Words shall be taken in *mitiori sensu*; but to a common intendment.

(1) Cro. Car. 509. 1 Vin. 507. *Rivers v. Light*.

(2) Cro. Jac. 162. 1 Rol. Ab. 35. *Post*, C. 302.

(3) 1 Rol. Ab. 42-3. *Hamber v. Ainge, Mann. Index*, 195, 2d edit.

(a) Words, however, not reduced to writing, are not actionable, *merely* because they affect a man's fame, unless they are attended by special damage: *Holt v. Scholefield*, 6 Term Rep. 694: though some cases are contrary, *Smale v. Hammon*, 1 Bulstr. 40. *Button v. Heyward*, 8 Mod. 24. *S. C.* from MS. Rep. 1 Viner, 507.

(b) These instances are nearly all to be found in 1 Rol. Ab. 52—58. And see Hob. 117, 140. *Post*, C. 308, 309.

(c) The rule for taking words in *mitiori sensu* has been long exploded. *Button v. Heyward*, 8 Mod. 24. *Harrison v. Thornborough*, 10 Mod. 198. *Roberts v. Camden*, 9 East, 96.

(d) See cases of slander, *post*, p. 274—280. Of words reflecting upon counsel, see Com. Dig. Action for defamation, D. 22. Bac. Abr. Slander, (B). pl. 116, &c. 1 Viner, 461. In the principal case, the distinction between written

and oral slander is not adverted to: but, another between the same parties, and, about the same time, is commonly cited as the first instance in which the two species are distinguished with reference to their actionable nature. *King v. Lake*, Hardr. 470. and any words, reduced to writing, which tend to vilify the character, will now support an action on the case. *Villers v. Monsley*, 2 Wils. 403. This distinction has been adhered to ever since; 1 Saund. by Willms. 247 a. n. (8); and, was particularly discussed, in *Thorley v. E. of Kerry*, 4 Taunt. 355; where it was recognized and confirmed; although Mansfield, C. J. doubted whether there was any sufficient foundation for it in principle. It must be confessed that the arguments of "greater deliberation," "malice," and "tendency to disturb the peace," usually employed to support this distinction seem to have no place in a civil action, where the injury

to the party is the ground work of the proceeding, see 4 Taunt. 365; yet it is submitted, that as the great probability of an injurious consequence is the reason for which many defamatory words are held to be actionable *per se*, and the allegation of special damage to be super-

fluous, *Lowe v. Harewood*, Sir W. Jones, 196. 3 Black. Com. 124. the same presumption of Law may be reasonably extended to a mode of slander, which from its nature is likely to be more *diffusive* as well as more *permanent* than words merely spoken.

( C. 15. )      TURNER v. STERLING, LORD MAYOR.—In C. B.

S. C. 1 Vent. 206. 2 Id. 25. 2 Lev. 50. 3 Keb. 26, 32.

Action on the Case lies against the mayor of London for refusing a poll at the election of a bridge-master. *Vid.* stat. 11 Geo. 1, c. 18.

(1) See the declaration in 2 Vent. 25.

[ \* 16 ]

41 Ed. 3, 24.

(2) 1 Rol. Ab. 108.

(3) *Post* p. 431-2 Ld. Raym. 956.

(4) *Post*, p. 382, 431. Co. Lit. 59 b. n. 6. 1 Rol. Ab. 108. 2 Ld. Raym. 947.

TURNER stood to be elected bridge-master *secundum consuetudinem*; the Lord Mayor dissolved the assembly, and would not suffer him to go to the poll (1), but put one of his friends into the place: it was moved in arrest of judgment that the action will not lie; because here was no certain loss, but only a possibility of a loss, because it was uncertain, if he had gone to the poll, whether he should have had it or not; but resolved by *Tyrrell*, *Archer*, and *Wild*, that an action will lie for a possibility of damage, as *Banister's* and *Borretor's* case, 17 Jac. To say a man is a \*bastard in his father's lifetime, actionable, although it is possible his father might sell his land, and so he might have no inheritance to lose by it; but *Vaughan* denied that case (a). If I have a market and toll for beasts, and one that is coming with beasts be hindered by J. S., I shall have an action against J. S., although it is possible the beasts might not be sold (b), and cited Bro. *Action sur le case*, 120. 9 H. 6, 60. An action against an archdeacon, *Sil ne voile induct*. Nat. Br. 94; Letter H. Nat. Br. 94 (2), against a bishop, for not admitting. Hob. 318 (3). 6 Ed. 4, 9, b. Hob. 205, 206. 14 H. 8, 31. 21 Ed. 4, 23.

An action on the case will not lie against the lord of a manor for not admitting a copyholder, nor against feoffees in trust, if they will not convey; nor against feoffor, if he will not make livery; but the proper remedy is by *subpœna* (4). Judgment *pro Quer*. But *Vaughan*, Chief Justice, doubted, because all persons that stood might have the like action, if this would lie; and afterwards, viz. *Pasch*. 1672. *Sur bre d' Error le Judgment fuit affirme en Bank le Roy* (c). [*Vid.* 1 Ventr. 206. 2 Lev. 50.]

(a) 1 Rol. Ab. 37, 38. Com. Dig. Action on Case for Defamation, D. 11, 12. 2 Ventr. 28. *Post*, p. 296. 1 Ld. Ray. 379. 2 Id. 1287.

(b) S. P. Fitzh. *Action sur le cas*, pl. 31. 1 Rol. Ab. 106. 2 Ld. Ray. 948. Fitzgib. 174. *Bailiffs of Tewkesbury v. Diston*, 6 East, 462. *Weller v. Baker*, 2 Wils. 422.

(c) This case was said by Hale to be a "very good precedent." 1 Ventr. 207. It is frequently cited in *Ashby v. White*,

6 Mod. 48, 55, 56. 1 Salk. 20. 2 Ld. Raym. 942, 946, 947, 948, 955, 956. and see *Herring v. Finch*, 2 Lev. 250. *Shaw v. Burgess of Colchester*, 2 Mod. 228. *Soames v. Barnardiston*, *post*, p. 390, 430. Buller's N. P. 64. *Drewe v. Coulton*, 1 East, 564, n. Bac. Ab. Actions on the Case, F.1. 1 Com. Dig. Action on Case for Misfeasance, A. 1. Id. for Negligence, A. 2. 3 Woodes. Lect. 208. With respect to the inconvenience occasioned by a multiplicity of suits, insisted



upon by Vaughan, C. J., see *Williams's* Raym. 955. *Phillibrown v. Ryland*, case, 5 Co. 73. Com. Dig. Action upon 8 Mod. 354. *Lecaux v. Eden*, 2 Dougl. the Gase, B. 2. *Ashby v. White*, 2 Ld. 609.

## SACHEVERELL v. WALKER.—In B. R.

( C. 16. )

S. C. by the name of *Sacheverell v. Froggat*, 2 Saund. 367. 1 Vent. 148, 161. 2 Lev. 13. T. Raym. 213. 2 Kebl. 798, 819, 833, 839.

JAMES SACHEVERELL, under whom the plaintiff claims, makes a lease for years to the defendant, yielding and paying the yearly rent of £100 during the term, to the said J. Sacheverell, his executors and administrators, and then covenants for him, his executors, &c. to pay the said rent; the lessor dies: the sole question was, whether or no this rent were determined by his death, an action of covenant being brought; for if the reservation of the rent after his death were void, then covenant would not lie, for the covenant is governed by the reservation (1). *Hale*, Chief Justice, gave the opinion of the Court upon these reasons: Every one that has an estate, has it in one of these two capacities; if it be a fee-simple, then he hath a capacity that transmits the estate to the heir; if it be a term for years, then his capacity transmits it to the executors; and a reservation is but a return of something out of the thing demised, by way of retribution out of the estate demised, and so it shall enure as the estate should have done: Therefore, if a man has a term for 100 years, and makes a lease of it for 50 years, reserving a rent during the term, to him and his heirs, it is void as to the heirs, but shall go to the executor. If two jointenants make a lease for years without indenture (so as there may be no estoppel) reserving a rent to one of them, it shall enure to them both. An indenture of lease was drawn from two jointenants, rendering 20*l.* rent; one only sealed the deed, the rent was arrears; he that sealed the deed brought his action; and resolved that he should lay the demise of a moiety, yielding 10*l.* rent, 21 Car B. R. cited (2). Tenant in tail to him and the heirs female of his body, makes a lease according to the statute, reserving rent to him and his heirs; it was a good reservation within the statute, because the law will use all possible industry to make the rent wait upon the reversion (3). If the owner of the land and a stranger lease by indenture, reserving rent, this shall enure to the stranger by conclusion (4); but here can be no estoppel, because the executors are not parties to the deed, and so it cannot come to them. The Lord Clare and his wife join in a lease of his land, reserving a rent to them, &c, this was good to him alone; for it could not enure by estoppel as to the wife, because she was a feme covert; and resolved he might declare as of a lease made by himself (b).

J. S. seised in fee (a) leases for years reserving rent "during the term to the said J. S., his executors and administrators, &c." The rent is not determined by the death of J. S., but follows the reversion.

Dyer, 45 a. pl. 1. 1 P. Will. 555. Latch, 275.

(1) Dyer, 28 b. Post, C. 609. 1 P. Will. 557.

1 Co. 100.

[ \* 17 ]  
Co. Lit. 47 a.

(2) *Bond v. Cartwright*, 2 Rol. Ab. 453, l. 35.

(3) *Cother v. Merrick*, Hardr. 89.

(4) 1 Saund. 370, and n. (5). Harg. Co. L. 213 b. n. 1.

(a) That J. S. was seised in fee and that plaintiff was devisee of the reversion, see S. C. in 1 Ventr. 161; and see the pleadings in 2 Saund. ubi supra.

(b) *Brereton v. Evans*, Cro. El. 700. *Beaver v. Lane*, 2 Mod. 217. *Arnold v. Revault*, 1 Brod. & Bing. 443.

A reservation shall not be construed so strictly as a grant. *Vid.* Hob. 130.

(1) *Brudnell's* case, 5 Co. 9.

(2) *Hill v. Hill*, Moo. 876.

27 Hen. 8, 16.

(3) *Quare*, addition?

Also a reservation shall not be construed so strictly as a grant; as if lease be made for 100 years, if A. and B. do so long live, it determines by the death of one of them (1); but a reservation of rent, if they so long live, shall not determine till the death of them both (2); and so a feoffment to one or his heirs creates but an estate for life, 5 Co. 111; but a reservation to one or his heirs, all one as to him and his heirs, 1 Inst. 214 (c). If it had ended at *during the term*, the reservation had been good without dispute; and it being so, it shall not be avoided by an omission (3) of these words which are void. Judgment *pro quer. per Curiam*, Nov. 18, 1671 (d).

*Vide* 2 Cro. 290. *Semb. cont.* Lat. 100, 255. 1 Jon. 309.

(c) But such a reservation is there said to be good only for life and void for the heir, acc. Co. Lit. 8 b. *Mallory's* case, 5 Co. 112; *aliter* where rent was reserved to an "abbot or his successors during the term." *Ibid.* and 1 Ventr. 163. For cases in which *or* has been taken to be equivalent to *and*, and *vice versa*, see *Chapman v. Dalton*, Plowd. 288, 289. 6 Cruise Digest, 183, 2d edit. For the different constructions of grants and reservations, see Co. Lit. 197 a.

(d) See notes to this case in 2 Saun-

ders. S. C. and 19 Viner, Reservation, N. Com. Dig. Rent, B. 5. 2 Thomas's Co. Lit. 413, 414, 415, notes. Generally, a reservation *during the term* will cure any defect in naming the representatives, and will supply the omission to name them, 2 Preston Conv. 186. But unless rent be reserved generally, without saying to whom, or be reserved *during the term*, it cannot go to heirs or executors who are not named; but will determine on the death of the lessor. *Ibid.* 185.

( C. 17. )

FERDINAND MYAN v. ANNE OKEY.—In C. B.

S. C. by name of *Mayn v. Okey*, T. Jon. 5.

To say that plaintiff "for-swore himself," &c. is actionable, if the words appear to be spoken concerning a trial in a Court of record.

*Post*, C. 70.

[ \* 18 ]

THERE being a trial between the defendant and one Holford, the plaintiff was produced as a witness against the defendant: and here he avers that he swore nothing in that trial but what was material to the issue; and that the defendant spoke these words to him, "Mr. Myan forswore himself in every thing that he swore in this cause," (discoursing of that trial at Guild-hall). Moved in arrest of judgment that the action will not lie, because it is not said that he perjured himself; but resolved *per Wild* \* and *Archer*, that the action well lay, because he says that he swore nothing in the cause but what was pertinent to the issue (a); and she saying that he forswore himself in that cause, and it appearing to be in a Court of Record (b), it is well maintainable: and *Wild* cited a case where the words were these, "thou hast forswore

(a) "He which will have benefit by an action for slanderous words for perjury, (saying that he was perjured,) he ought certainly to shew this to be in a Court, and in a matter pertinent to the issue." *Croford v. Blisse*, 2 Bulstr. 150, (140). It is not usual to make the above averment of pertinence in the declaration. See *Liber Placitandi*, p. 47-8. *Gilb. Cases in L. & E.* 115-6. 3 Chit.

Plead. 355-6. But it is conceived, that the defendant may shew under the general issue, that the words were spoken with reference to some immaterial evidence; or if he justifies specially, must shew it to have been material.

(b) It is not necessary that the Court should be *of record*, see 1 Hawk. P. C. c. 69, s. 3. *Post*, p. 506, C. 681.



thyself;" the defendant justifies, that in such a cause in a Court of Record he swore false; although the first words were not actionable of themselves, yet having explained himself in his justification, that it was intended of a false oath in a Court of Record, the action well lay. Authorities cited Cro. Eliz. 135. Hob. 283. *pro quer'*.

The want of introductory averments in declaration for words may be cured by defendant's justification (c).

(c) *Sed vid. Badcock v. Atkyns*, Cro. El. 416. That the want of a *colloquium*, is not cured by verdict for plaintiff on the general issue, see *Hawkes v. Hawkey*, 8 East, 427. For actions upon words of perjury, and the distinction between

"perjury" and "forswearing," see *Croford v. Blisse*, 2 Bulstr. 150. 3 Inst. 165. Com. Dig. Action on the Case for Defamation, D. 5, 7. F. 5, 18. 1 Viner, 404, 414. *Holt v. Scholefield*, 6 Term Rep. 691. *Hawkes v. Hawkey*, *supra*.

### BROWNE v. ROBINSON.

( C. 18. )

THE plaintiff was a sugar baker, &c. and the defendant discouraging with one of his creditors, to whom he owed about 40*l.* said, "I will not give you two shillings in the pound for your debt, he (*innuendo* the plaintiff) is a pitiful fellow, and owes forty pounds more than he is worth." By the opinion of the Court the words are actionable. 1 Rol. Ab. 61 (a).

Words spoken of a trader.

(a) A *colloquium* concerning the plaintiff's trade is necessary, 2 Saund. 307 a. n. (1), by Williams. *Hawkes v. Hawkey*,

8 East, 433. *Vid. Stanton v. Smith*, 2 Ld. Raym. *semble contra*.

### STEPING v. GLADDING.—In C. B.

( C. 19. )

THE testator of Gladding was register to the archdeacon of Suffolk, and grants the office of his scribe to the plaintiff, and covenants that he shall enjoy it as long as he or any other person had or did claim the place of register under him; and that he would not revoke, annul, or evacuate the said grant; afterwards he surrenders his place to the archdeacon; and the plaintiff being disturbed brings covenant: resolved that it would not lie, because that having surrendered his place, the archdeacon did not claim under him, but his estate was absolutely drowned; and the covenant was but for as long as he or any body claiming under him had the office of register. *Vide* Hob. 41. *Quod quer' nil capiat*.

See *S. C. post*, p. 20.

### BROWNING v. HALFORD.—In C. B.

[ \* 19 ]

( C. 20. )

HALFORD contracted with Browning (being high sheriff) for the under-sheriff's place for 100*l.* and for the payment of the said 100*l.* gave a bond of 200*l.* to his son, upon which the action was brought: the defendant pleads the statute of 5 Ed. 6, that all contracts for offices concerning the execution of justice shall be void, and then says that *corrupte agreatum fuit*, &c. The Judges inclined that the bond was void (a); (and so adjudged in the King's Bench, *ut audiui*);

Bond for the sale of the place of under-sheriff void by statute 5 & 6 Edw. 6.

(a) *Post*, C. 576. 16 Viner, 127. *Ballantine v. Irwin*, Fortesc. 368. The above case is expressly provided for by 3 Geo. 1, c. 15.

Misrecital of day of holding the parliament, fatal. *Post*, C. 380, 572, 578.

but by reason the defendant had misalleged the day of the holding the parliament, the Court inclined against the defendant, and cited *Partridge's* case in Plowd. Here the defendant alleged *ad parl. tent.* 13, instead of 23. Justice *Wild* said, he knew a great cause miscarry in the King's Bench upon the statute of hue and cry, in saying *tent. apud Westminster*, instead of Winchester; it was put off till the next term.

( C. 21. )

BROWNE v. HARTSHORNE.—In C. B.

Court Baron may be holden before the steward by prescription.

TRESPASS for taking his horse: the defendant justifies by virtue of a *distringas* out of a Court Baron in the manor of Scrooby. Three exceptions taken by *Nudigate* to the justification: 1. Because he says the Court was held before the Steward, or Clerk of the Court; whereas a Court Baron ought to be held *coram sectataribus*; the Court inclined that was well enough, because such Court may be held so by prescription (a).

Justification by officer of inferior court under a *distringas ad resp.* is good without averring a plaint entered.

*Post*, p. 317.

(1) *Bohun Privil.* 306, 311. 14 East, 222.

But it must shew the process returned.

(2) *Quære*, *Keilway*, 89, pl. 12?

*Except. 2.* Because he doth not say any plaint was entered; but that was supposed to be well enough, because he doth say that he did *distringere ad respondendum* such a one, &c. And this difference was taken by *Wild*, that if a Serjeant in London justifies an arrest, he must shew that there was a plaint entered, for that is his warrant, and he has no other (1); but a bailiff, that hath a warrant under hand and seal, need not aver that a plaint was entered, for his warrant is his justification (b).

*Except. 3.* Because he doth not shew that he returned the process; nor that any Court was holden after it, and that was supposed to be fatal. 12 H. 8. *Kelloway* (2); *sed Curia advisare vult quoad proximum Term'* (c).

(a) *Vide post*, *Harland v. Cocke*, p. 316; and C. 397. *Cro. Jac.* 582. *Cro. El.* 791. 1 *Leon.* 316. *T. Jones*, 23, 129. 1 *Mod.* 173, 75. 2 *Ld. Raym.* 860. *Holroyd v. Breare*, 2 *Barn. & Ald.* 477. *Nels. Lex. Man.* 55, 58. *Bac. Abr. tit. Court-baron.* *Howard v. Wood*, *post*, p. 473-9.

(b) *Acc. Powell, B.*, in *Gwynne v. Poole*, 2 *Lutw.* 1561, where the want of a plaint is said to be only error. See *Hale v. Claro*, 6 *Mod.* 150. *Com. Dig. Imprisonment*, H. 8. But see *Read v. Wilmot*, 1 *Ventr.* 220. *Patrick v. John-*

*son*, 3 *Lev.* 404. 2 *Lev.* 81. *Bennett v. Therne*, *post*, p. 356. 3 *Keb.* 221, 251. *Squibb v. Hole*, 2 *Mod.* 30. *Moore v. Taylor*, 5 *Taunt.* 71. *Rowland v. Veale*, *Cowper*, 18; and the following precedents of justifications by officers under *mesne* process of inferior Courts, *Rastal*, fol. 668, pl. 2, pl. 3. *Liber Placitandi*, p. 302, 309, 312, 378. 2 *Lutw.* 938.

(c) *Willes*, 33, n. (a). *Id.* 126, n. (b). 5 *Taunt.* 69. 10 *East*, 73; and *Bennet v. Evans*, *post*, C. 388. *Middleton v. Price*, 1 *Wils.* 17.

[ 20 ]

( C. 22. )

HARVY & CORYDON v. WILLOUGHBY.—In B. R.

*S. C.* 2 *Saund.* 115. 1 *Vent.* 167. 2 *Lev.* 27. 2 *Keb.* 631, 803, 822, 838, 850.

The owners of two antient mills in a manor, at one or the other of which

THE plaintiffs intitle themselves to each of them a mill, and declare that they had used to repair the said mills, and prescribe, that all the inhabitants within the manor had used to grind *omne frumentum* that they spent, &c. at their mills, or

at the mill of one of them (1). Two exceptions were taken to the declaration by the Court; for as this prescription is alleged, possibly one of the plaintiffs might have no cause of action; for if A. have an ancient mill where the inhabitants use to grind, and B. erects a new mill in the same town, it may be truly said, that the inhabitants are to grind at the mills of A. and B. or the mill of one of them, although they were not obliged at all to grind at the mill of B. *Per Hale, C. J.*—But to intitle them both, it ought to be alleged that all the corn not ground at the mill of A. used to be ground at the mill of B. and that all the corn not ground at the mill of B. used to be ground at the mill of A. and then both had been intitled (a). *2d Excep.* They prescribe to grind *omne frumentum* spent in their houses, which is not good, for it may be they spent corn and never ground it at all; as what they give their pigs and hens, and make frumenty with, which they shall not be obliged to grind; but it should have been said *omnia grana molienda*; and *Twisden* cited *Ayliffe & Charlesworth's* case, where the prescription was adjudged bad for this point. *Jud' pro def'. Vide Hob. 189 (b).*

the tenants are bound to grind, may join in an action for not grinding at either.

(1) See the pleadings in 2 Saund. S. C.

But a prescription to grind all the corn spent in their houses, is bad.

(a) *Weller v. Baker*, 2 Wilson, 414. 654. *Cort v. Birkbeck*, Dougl. 218. 2 Viner, 55. Saund. 117 f. n. (3). *Up John v. Conduit, post*, p. 460.  
(b) *Drake v. Wiglesworth*, Willes,

### BRIAN v. MUNTETH.—In B. R.

( C. 23. )

ACTION of debt upon a bond; the condition was to seal an indenture of demise, and to perform all covenants contained therein: the defendant pleads that he sealed the demise, and performed all the covenants therein: the plaintiff demurs, because he doth not set forth what the covenants are. Judgment *pro quer. nisi* (a).

A plea of performance to debt on bond, conditioned to perform covenants in an indenture, must set forth the covenants.

(a) *Post*, p. 156. Het. 80. Cro. Car. 421. *Jevens v. Harridge*, 1 Saund. 9 c. and note (1), *ibid. Earl of Kerry v. Baxter*, 4 East, 340.

### STEPING v. GLADEN.—In C. B.

( C. 24. )

*S. C. ante*, p. 18.

GLADEN being register to an archdeacon grants the office of scribe to the plaintiff, as long as he or any body claiming under him should exercise the place of register, and then covenants, *Quod non revocaret, adnullaret seu evacualet* the said grant, and after surrenders the office of register to the archdeacon; and the plaintiff brings his action upon this covenant. Resolved, that the action will not lie; for the grant being but during the time that he or any body claiming under him should be register, when he surrendered the place the archdeacon did not claim under him (nor any body else); and the covenant, that he will not revoke, &c. extends only to the

An officer (A) grants a dependent office, with a covenant for enjoyment as long as A., or any claiming under him, shall exercise the superior office, and also a covenant not to revoke

[ \* 21 ]

or annul his grant: a surrender of the superior office by A. is no breach.

grant of the scribe's place. And *Vaughan*, C. J., said, it is no more than if a justice of peace grants to one to be his clerk, and covenants, that he will not revoke or annul the said grant; if he be afterwards put out of commission he hath not broke the covenant, for it is but whilst he is justice of peace; and so of a bailiff of a manor, or keeper of a park, the owner may dispark. Hob. 41. *Jud' quod querens nil capiat*.

( C. 25. )

RUTTER v. ———.—In C. B.

Agreement by plaintiff not to join with his uncle in a suit commenced against him by defendant, is not a good consideration.

1 Viner, 328.

AND declares, that whereas the defendant was commencing a suit against the uncle of the plaintiff, in consideration the plaintiff would not join with his uncle in the defence of the said suit, the defendant promised to give him 10*l*. Resolved, that here was no good consideration, unless that he had set forth a pretence of some interest in the land, or that he was heir to his uncle, whereby it would have been in probability an advantage to him, that the land should not be recovered by the defendant, but there being no such inducement laid, it is no more than if he had said to a stranger, if you will not join in the suit I will give you 10*l*. *Jud' quod querens nil capiat per billam*.

(a) What degree of interest in the subject matter, or of kindred to the party will make such intermeddling lawful, see

1 Hawkins, P. C. c. 83. *Sharp v. Carter*, 3 P. Wms. 378. *Master v. Miller*, 4 Term Rep. 340.

( C. 26. )

ANONYMUS.—In B. R.

Mandamus lies to restore a sexton.

Mar. 101. 7 Mod. 118. Sty. 457. 2 Roll. 455. Latch. 124.

Dy. 150, 209, 333.

*Semble*, S. C. *Ile's case*, 1 Vent. 143, 153. 2 Lev. 13. T. Raym. 211. 2 Kebl. 802.

A MANDAMUS was moved for to restore a sexton to his place; the Court at first doubted whether it would lie or not; but afterwards *eodem termino* it was granted. *Hale*.—It will lie for the steward of a court-leet (a), or court-baron (b). *Twisden*.—It will lie for a constable (c), parish clerk (d), or church warden (e), because they are publick officers; it was also granted to restore a fellow of New College *eodem termino* (f). *Vide* 11 Co. 28. *le power de le bank le roy en ceo*.

(a) *Vide* 1 Sid. 40, 169. 2 Sid. 112. 12 Mod. 666. T. Ray. 12.

(b) *Vide* 1 Sid. 40, 169. 8 Mod. 98. 12 Mod. 666. Comberb. 127. Fitzgib. 194, *contra*.

(c) 2 Hawk. P. C. c. 10, s. 47. 1 Bulstr. 174. T. Raym. 12. Noy, 78.

(d) Sayer, 159. Cowper, 370.

(e) *Post*, C. 469. 2 Sid. 112. 3 Mod. 335. 8 Mod. 325. 1 Ld. Raym. 136. 1

Stra. 609, 610. 3 Burr. 1420.

(f) *Sembl.* S. C. 2 Lev. 14; in which, however, the writ was refused, because there was a visitor. See 2 Sid. 112. *R. v. Whaley*, 2 Stra. 1139. 15 Viner, 186. Bac. Abr. Mandamus, C. 2.—Burn's Eccles. Law, tit. Colleges. Case of *Exeter college* in *Stillingfleet's Tracts*, 2 vol. p. 411, 425.

## DE TERM. S. HILARII, 1671.

IN BANCO REGIS.

## ELBEROUGH v. GATES.

( C. 27. )

S. C. 2 Kebl. 874. S. C. but not S. P. 2 Lev. 68. 3 Kebl. 69, 125.

DET sur obligation condition-  
ed pur le performance d'un  
award, proviso, that it be  
made in writing ready to be  
delivered at the shop of J. S.  
The defendant pleaded *nul-  
lum fecerunt arbitrium*; the  
plaintiff sets forth the award,  
et monstre q'fuit parat' estre  
deliver *secundum formam et  
effectum conditionis*. Resolve  
q'le replication est male (doit  
aver q'fuit parat' estre deliver  
a le lieu &c.) (a), et q' e' mat-  
ter de substance et sic ge-  
neral demurrer est bien.

DEBT upon an obligation con-  
ditioned for the performance  
of an award, *proviso, that it  
be made in writing ready to  
be delivered at the shop of  
J. S.* The defendant plead-  
ed "no award;" the plaintiff  
sets forth the award and  
shews that it was ready to be  
delivered "according to the  
form and effect of the condi-  
tion." Resolved—that the re-  
plication is ill (it ought to  
aver that it was ready to be  
delivered at the place, &c.) (a)  
and that it is matter of sub-  
stance, and so a general de-  
murrer is good.

Replication to  
a plea of "no  
award," stating  
that it was rea-  
dy to be deliver-  
ed "according  
to the form and  
effect of the con-  
dition," is bad,  
where the con-  
dition appoints  
a particular  
place for delive-  
ry.

(a) See *Jenkinson v. Alisson*, post, p.  
415. *Burges v. Player*, post, p. 467.  
*Busfield v. Busfield*, Cro. Jac. 577.  
*Roweby v. Manning*, 3 Mod. 331. *Doy-*

*ley v. Burton*, 1 Ld. Raym. 533. Com.  
Dig. Arbitrament I. 6. 3 Viner, 113—121.  
*Everard v. Paterson*, 2 Marsh, 304.

## BUCKLE v. MORE.

( C. 28. )

S. C. under different names, 1 Vent. 191. 1 Mod. 89. 2 Kebl. 874.

ASSUMPSIT to pay money within six months; *le defendant  
plead Non assumpsit infra sex annos, est male, sed doit plea-  
der q' causa actionis non accrevit infra sex annos*, for the ac-  
tion accrued from the default of payment, not from the time of  
the promise (a).

*Actio non ac-  
crevit infra sex  
&c.* when a pro-  
per plea.

(a) *Shutford v. Penow*, Cro. Car. 139. *v. Emblers*, 3 Burr. 1281. 2 Saund. 63  
*Gould v. Johnson*, 2 Salk. 422. *Fenton* b. n. (6), by Wms.

## EMERSON v. AMELL.

( C. 29. )

S. C. 1 Vent. 187. 2 Kebl. 874.

EXECUTOR brings an action of trespass upon the statute of  
4 Ed. 3, for cutting and carrying away of corn in the lifetime  
of the testator; and damages intire being \*given(1), and judg-  
ment thereupon in C. B., a writ of error was brought to re-  
verse the judgment; because the statute gives only remedy

Trespass lies  
at the suit of an  
[ \* 23 ]  
executor, for  
cutting and car-  
rying away  
growing corn in  
the lifetime of  
the testator (a).

(1) Post, C. 102, 117.

(a) Sir W. Jones, 174. Latch, 168. tel, 1 Ventr. 187. 2 BlComm. 404. Such  
11 Viner, 127. Growing corn is a chat- crops are *fructus industriales* which go to

for goods taken away, and so there ought to have been nothing given for the cutting. But it was resolved *per Curiam*, that it was well enough, because it is one intire trespass; and setting forth the cutting is but a description how he took them away; as if a man cut a tree and carry it away presently, it is not felony, but one intire trespass; but if he cut it and let it lie, that the property sleeps for a time in the owner, if he then fetch it away, it is felony. *Per Hale* (b).

the executor, and are seizable as goods and chattels under a *fi. fa.* *Peacock v. Purvis*, 2 Brod. & Bing. 368, 369. 2 Fonbl. Eq. B. 4, P. 1, c. 1, s. 8. Hence it seems to be immaterial whether the testator in the principal case had a freehold or chattel interest. But it is otherwise of *natural produce*: thus an executor cannot bring trespass for *grass* of the testator cut and carried away at the same time, 1 Ventr. 187. And where the declaration in trespass by an executor contained one count for cutting and carrying away *timber trees* of the testator, and another for an asportation, and a general verdict was given on both; the first was admitted to be bad; but as it appear-

ed by the Judge's notes that the damages were calculated on evidence applicable to the second count only, the verdict was amended by the Court; *Williams v. Breedon*, 1 Bos. & Pul. 329. This subject is discussed at some length in Wentworth's Office of Executors, chap. 6, in which an opinion is expressed, that an action survives to the executor for a trespass done even to the *natural fruits* of the soil, where the testator had such an estate in the land as devolves to his personal representatives. *Ibid*, p. 70, edit. 1763.

(b) 1 Hale H. P. C. 510. *Lee v. Risdon*, 7 Taunt. 191.

## ( C. 30. )

## ANONYMUS.

Prohibition refused to stop probate *quoad* lands.  
*Post*, p. 68.

PROHIBITION moved for to stop the probate of a will (that did concern lands and goods) *quoad* the lands; but denied *per Curiam*. Cro. Car. 396 (a).

(a) *Partridge's case*, 2 Salk. 552. 11 Vin. 60. Styl. Pr. Reg. 508, 4th edit. 4 Burn's Eccles. Law, 238 a. n. 2, 8th edit.

## ( C. 31. )

## WALKER v. MILLER.

S. C. 2 Kebl. 858, 876.

Construction of a claim of common.

COMMONER brought an action for inclosing and depriving him of his common; and sets forth the custom, that for two years, when the land used to be sowed, he had common from the time that the corn was reaped *quousque reseminaretur*, and every third year, when the land used to lie fallow, he had common *per totum annum*. It happened the land was not sowed in seven years or more; the question was, what common the party might claim. (And by *Hale*)—He had right to put in his cattle *per totum tempus* that it was not sowed, for when his cattle were in, he was not bound to take them out *quousque reseminaretur*; and if the owner did not sow it, he might continue his cattle (a).

(a) Another case, apparently between the same parties, is reported in 2 Saund. 3. 2 Kebl. 658, 676. 1 Sid. 462. 1 Ventr. 92.



## LADY BALTINGLASS.

( C. 32. )

S. C. under the name of *Tustian* or *Tristram* v. *Roper*, - Vaugh. 28. T. Jo. 27.

THE case was this: upon a special verdict Sir Arthur Throckmorton, father to the Lady Baltinglass, was seised of the lands in question, and conveyed them (amongst other uses) to the use of Sir Peter Temple (who married the said lady) and his lady, during their lives, and after their deaths to the use of the first, second, &c., sons of their bodies to be begotten; proviso, that it shall be law\*ful for the said Sir Peter to set and let any of the said lands usually letten, for twenty-one years, or for any number of years determinable upon one, two or three lives, reserving the old rent; Sir Peter leases the lands in question for 99 years, determinable upon three lives, (reserving the usual rent) and for so long (a) as the lessees should duly pay the said rent. For part of the land they did not find any former lease; and for the other part they found that it was formerly leased, but found but one lease. It was argued by Serjeant (b) *Jones* *pur les lessees*, and by Serjeant *Ellis* *pur le Dame Baltinglass*.

1st Question was, whether the leases were good in their creation; for it was agreed on both sides, that the lease was not derived out of the estate of Sir Peter, (for he had but an estate for life) but out of his power, and then he ought to observe all the circumstances and circumscriptions of that power. It was first doubted, whether this land shall be said to be usually let, as it is found; it was agreed, that land shall not be said to be usually let, unless it be twice leased.

*Vaughan* took a difference between usually demised and lands usually in demise; for he said, that lands might be said to be usually in demise if there were but one long lease of them; but usually demised must be twice let. Serjeant *Jones* said, a special verdict shall be taken by intendment; and it being found that the old rent was reserved, it shall be intended to be usually demised; and for the intendment of special verdicts he cited Cro. Eliz. 167. 2 Rolle, 697. Hob. 52. Cro. Eliz. 515. (*Vid. T. Jo. 28, 29. Post, C. 611.*)

2nd Question was, admitting that the words "so long" do amount to a limitation, whether a demand of the rent is not requisite to determine the leases; the cases in 7 E. 4, 16, and 37 H. 6, 27 were agreed(1). But *Jones* took a difference between a limitation that depends upon the doing of some collateral act which is to be but once done, and the payment of a rent issuing out of the land, which hath successive acts; that in the last case there ought to be a demand, but in the first not. Upon a condition, though the rent be payable out of the land, yet there ought to be a demand before entry. Cro. Eliz. 415, 536. No advantage of a *nomine pœnæ* without demand. Hob. 82. Godb. 154. No penalty shall incur for non-payment of rent without demand. Cro. Car. 76. Hob. 8. 2 Cro. 145. 1 Anderson, 237. 1 Roll. 460. And

A lease for years, "so long as the lessee shall duly pay the rent," makes a limitation, and not a condition;

[ \* 24 ]

and so no demand of rent is requisite to avoid it. *Vid. post, p. 414.*

The words "usually let" have two meanings: 1st, They mean repeated acts of leasing; 2dly, lands usually in demise, as under a single long lease.

Lessor under a power must observe all the circumstances and circumscriptions of that power.

6 Co. 37.  
2 Roll. 262.

(1) T. Jo. 32.

No advantage can be taken of a condition, *nomine pœnæ*, or penalty for non-

(a) This limitation was required by p. 29.  
the power; see the words of it in Vaugh.

(b) See his argument in T. Jones.

payment of rent,  
without a de-  
[ \* 25 ]  
mand. *Post*, p.  
242, 414. *Hob.*  
331. 3 *Taunt.*  
246. 2 *Maul. &*  
*Selw.* 525.

(1) *Sed vid.*  
1 *Anders.* 273.  
2 *Roll. Ab.* 261,  
pl. 9. *T. Jo.* 35.

*Vid.* 2 *Thom.*  
*Co. Lit.* 87, 121.

Construction  
of the words  
"at any time."  
*Vaugh.* 34.

*Jones* said farther, it will by this means be in the power of the tenant to determine his lease when he pleases, if no demand be requisite. *Ellis* took this difference: that if a bond be tendered before the day it is good; but otherwise of rent, for that ought to be tendered at the day. And Serjeant *Ellis* said, that it is usual, where a lease is derived out of a power, to add such a limitation, viz. so long as they shall pay the rent; because it is not properly a rent, and so no means for the reversioner to recover it (1). *Vide* 1 *Co.* 139 a.

*Puis in term' Paschæ fuit argue per Vaughan, C. J., q' done le opinion de tout le court et il dit*, that the lease was not derived out of the estate of Sir Peter Temple, but out of his power; and that *so long* was a limitation, and not a condition, and so no demand requisite. 1 *Inst.* 235 a.

2. For the clause, what shall be intended land at any time "usually let"? "usually let" *sumitur dupliciter*:

1. For several acts of leasing. 2. For land usually in demise, as a long lease of 500 years. *At any time* has various significations. 1. It is as much as *some time*, viz. were you at any time at York? 2. As much as *all times*, viz. such a one is to be spoke with at his house at any time. *Jud' pro def' q' fuit Dame Baltinglass* (c).

(c) See *Foot v. Marriot*, 3 *Viner*, 429, pl. 9. *Sugden Pow.* c. 10, s. 2. 2 *Thom. Co. Lit.* 434-5, notes.

### ( C. 33. )

#### NUTON'S CASE.

*Semb.* To say of a victualler that he puts lime in his ale, and that one lost his life and his eyes by drinking it, is actionable without special damage.

THE plaintiff sets forth, that he was *caupo, Angl'* a victualler, and of good fame, and the defendant maliciously spoke these words of him, "Robert Nuton puts lime in his ale, and killed Edward Cuthbert, and the poor man lost his life and his eyes by drinking Nuton's ale." It was objected by *Waller*, that the words are not actionable, because a victualler ought not to sell ale. 2. Because he hath alleged no special damage; *et le court incline q' les parols fieront actionable*.

### ( C. 34. )

#### SHUTE v. HIGDEN.

*S. C. Vaugh.* 129. *T. Jo.* 18.

See margin,  
p. 51, *post*.

### [ \* 26 ]

THE defendant was parson of Ringlington, which was of the real value of 50*l. per annum*, and but of 5*l.* in the king's books; he was afterwards presented to the parsonage of Elme, which was above 10*l. per annum* in the king's books, but neglects to read the articles according to the statute of 13 *Eliz.* whereby the benefice became void; the patron, before the end of the six months, presents the plaintiff to the first benefice, who brings an ejectment; and all this was found in a special verdict. Argued by *Maynard pro quer'*, and by *Ellis pro def'*.—There were three questions. 1st Question upon the statute of 21 *H. 8.* how the value of 8*l. per annum* shall be stated, whether according to the real value, or according to the king's books?



**2d Question.**—Whether or no the patron may not, by the common law, present to the first benefice upon the taking of the second, be the value of it what it will?

**3d Question.**—Whether his not reading the articles within two months, and thereby the avoiding of the second benefice, as if he had never been presented, doth not restore him to the first?

**Ad primam Qu.**—The computation of the value shall not be intended to be by the king's books, for those rates were not made till 26 Hen. 8, which was after the time of the making of the statute, and so the statute could not refer to them. 2. When an act of parliament doth intend those rates, it mentions them, as 13 Eliz 12. 3. No man, in pleading of value, ever saw mention made of the king's books, Dyer, 129, 237. It deserves no favor, for taking of two benefices was looked upon as an ill thing.

**Ad secundam Qu.**—He held, that the first benefice is void by the taking of the second, by the common law; and the patron may take notice of it, if he pleases, as appears in 4 Co. *Holland's case*; and fol. 78, *Digby's case*.

Post, C. 253.

**Ad tertiam Qu.** By not reading the articles, the presentation, institution and induction are void, as if they never had been, by the words of the statute; but this shall not restore him to the first benefice, for it shall be void as to him, but not to prejudice another.

Vaugh. 134.

**Ellis for defendant: Ad primam Qu.**—This statute was made for the repose and quiet of the church; and if it should not be valued by the stated value, it would hurry it *in perpetuam brigam*.

2. This statute was made for the encouragement of ecclesiastical persons; and what encouragement would it be to have a benefice of 8*l. per ann.* real value, and it has taken away all other maintenance, as farming, &c.

3. It was made for hospitality and relief of the poor, which cannot be done out of 8*l. per ann.*

4. The law will not admit the clergy to be adjudged by the laity for the value, but to have a certain value.

As to the objection that was made, that the rates were made after the statute. **Ans.** Though this rate were not then made, yet there were then stated rates, as appears \* 11 H. 4, 35. 24 Ed. 3, 35. Nat. Br. 44. He confessed if a man recover in a *quare impedit*, he shall recover the true value; because a tort-feasor shall be punished according to the tort he hath done: the cases for it are Noy, 38. Hugh. Abr. 184. and he cited a case of *Drake and Hill*, adjudged in C. B. *Pasch.* 10 Car. 1, *per Cur.* but the record could not be found; but it is cited in Cro. Car. 456. [ \* 27 ]

5 Barn. & Ald. 835.

Agreed **ad secundam Qu.**

**Ad tertiam Qu.** The statute says, the first living shall be void, as if there had never been institution, induction, &c. and if that had never been, certainly the first had never been

1 Rol. Ab. 856,  
l. 35.

The value of  
a benefice with-  
in 21 Hen. 8, c.  
13 shall be es-  
timated by the  
valuation in the  
king's books.

Post, p. 52.

void. He cited *Drury's* case, 8 Co. 5 Co. *Winsor's* case. The operation of an act of parliament is so strong, that where it makes a thing void, it is void to all intents and purposes, as 3 H. 7, 15. 4 H. 7, 10. 10 H. 7, 22. Dyer, 227. 15 Ed. 3. Fitz. Petition, 2. Dyer, fol. ult. *Wild*, put this case:—Tenant for life makes a feoffment upon condition, and the condition is broken, he enters for the forfeiture, the forfeiture of his estate is not purged by it. *Puis in Trin. Term fuit argue arere.*

*Nudigate pro quer.* Agreed that the rate shall be by the tax value in the king's books; for there were two express judgments lately in it:—1. *Inter le Bishop of Bristol and Hawley*, 8 Jac. in C. B. The other was Trin. 6 Car. in C. B. *Drake v. Hill*, Rot. 2284 (a). And to the third question he said, the statute shall not operate so violently as to avoid the presentation, for he was once lawful incumbent in the second benefice, as to receive tithes, &c. though he lost it by not reading the articles. Hob. 168. The grantee of a next avoidance presents by simony, it shall go for his turn. He agreed the last case in Dyer; but took a difference between not subscribing, which was precedent to his institution, and not reading.

*Baldwin* for the defendant: before the statute of 13 Eliz. institution and induction into the second had avoided the first; but now that statute hath a retrospect to 21 H. 8; and expounds acceptance there, for now he is not perfect incumbent till he read the articles; and relation by an act of parliament shall have great force, and sometimes be very violent, as 3 H. 7, 15. 10 H. 7, 15. *Vide post*, Case 64, (*for the judgment of the Court*).

(a) On the point of valuation, see T. edit. 1 Black. Com. 392. Degge, c. 4. Jones, 19. 2 Gibson's Codex, 945, 1st Com. Dig. Eglise, N. 5. 3 Atk. 455.

[ 28 ]  
( C. 35. )

#### CHAMBERLAINE v. PICKERING.

In *assumpsit* against an executor, who pleads several judgments and assets insufficient to satisfy any one of them, the plaintiff in his replication must answer all, and not one only. *Semb.*

11 Viner,  
342, 238. *Post*,  
C. 116. C. 141.

ASSUMPSIT against Pickering, executor: the defendant pleads four judgments, and that he had but 5*l.* assets to satisfy those judgments (each of the judgments being for a greater sum). The plaintiff replies to one of the judgments, that it was kept a foot by fraud and covin, &c. and demands judgment, whether he ought not to have his debt: it was objected that he ought not to answer only to one, but to all; as if a man plead twenty outlawries, and in bar, and the plaintiff reverse one of them, this will not serve his turn, but he must reverse them all. *Vaughan*. The defendant hath four strings to his bow, whereof each of them will serve his turn; though you have cashiered one, yet he hath three left; and the most proper replication would have been, that he had assets above 5*l.* and then if issue had been taken, and it had been found for the plaintiff, he should have judgment *de bonis testatoris*, as if issue had been taken upon a *plene administravit*, and assets

had been proved; *et ceo fuit refer al Serjeant Turner, q' fait fine de ceo (a).*

(a) See the observations of Vaughan, C. J., in *Edgcomb v. Dee*, Vaugh. 103, 104, 105. But it is held, that, the plaintiff may reply to all or any of the judgments pleaded, whether they were obtained against the testator, or against the executor as such, *Ent v. Withers*, post, C. 653. *Gilbert v. Dee*, post, C. 726. *Trethewy v. Ackland*, 2 Saund. 48. *Norton v. Harvey*, cited *ibid.* p. 50. *Hancock v. Prowd*, 1 Saund. 328, 336, and notes *ibid.* by Serjeant Williams. Bac. Abr. Pleas and Pleading, (K) 2. It is

not clear, (at least to the editor,) what form of replication is recommended by Vaughan in the text. But supposing that the judgments pleaded were obtained against the testator, it should seem that, if the plaintiff could not invalidate more than one judgment, he ought, in addition to his replication *per fraudem*, to have alleged assets in the hands of the defendant over and above what was sufficient to satisfy the remaining three judgments, as was done in *Hancock v. Prowd*, cited *supra*.

## DE TERM. PASCHÆ, 1672.

IN COMMUNI BANCO.

[ 29 ]

### WOODWARD v. CANTRELL.

( C. 36. )

*ACTION sur le case* for a vexatious suit, for that *false et fraudulenter et sine aliqua justa causa persecutus fuit a latitat*, for 200*l.* and by virtue thereof imprisoned him for several weeks: moved in arrest of judgment that the action would not lie, for then every plaintiff that is cast in his suit would be liable to a new action; but if he had set out the truth of the matter, that he had sued him before, and recovered the said debt, and so knowingly had sued him again, it might have been otherwise (a).

Action on the case for imprisonment under a vexatious suit.

Hob. 205, 266. *Waterer v. Freeman*.

(a) See *Traverse v. Daws*, p. 324, post.

### BOWLS v. HORTON.—In C. B.

( C. 37. )

S. C. Vaugh. 360.

WILLIAM VESSEY seised in fee devises to his son John, and the heirs male of his body, remainder to his son William, and the heirs male of his body, remainder to his own right heirs. William, the grandfather, dies; J. dies without issue male, but leaves two daughters, the now plaintiffs (1): William, the son, dies without issue male; and so the plaintiffs being the heirs to the devisor, bring this action. The defendant pleads that William, the son, being seised, did infeoff one J. Lane to the use of the feoffor for life, and then to the use of Anne Horton the defendant, and so to the use of his heirs; and this was \*with warranty against him and his heirs. The question was, whether this collateral warranty did bar the plaintiffs, during the estate of the defendant. It was argued by *Jones*, that it was a good bar. The case was agreed to be the same with that of *Spirt v. Bence*, Cro. Car. 368, and the arguments much the same. But the question made by *Vaughan* was, whether or no the statute *de donis* did not secure the donor from the warranty of tenant in tail, as well as

See margin, post, p. 56.

(1) Demandants in a writ of formedon in the reverter. *Vid.* Vaugh. S. C. in which the title is more precisely stated.

[ \* 30 ]

Issue of donee in tail is barred by a collateral warranty (without assets. Co. Lit. 374 b).

(1) *Vid. post*, p. 60, S. C.

the issues of the donee. It was answered by *Wild, J.*, that the issues of the donee shall be barred by a collateral warranty, which was agreed by *Vaughan*: And so shall the reversioner by the collateral warranty of another person (1); but the statute seems to protect him from the warranty of the donee, although collateral, as well as the issue: *et adjournatur*; for that point was not spoke to.

Trinity Term *fuit argue arere, per Ellis pro defendente, et Hopkins pro quer.*

*Ellis.*—A collateral warranty is not within this law; and for that the books are express, 2 Inst. 335. 1 Inst. 374 a. Fitz. Garanty, 16, 57. 27 Ed. 3, 83; but if the donor be privy in blood, so as the warranty descends upon him, he shall be barred.

*Quest. 2.*—Whether this warranty be preserved for the benefit of the wife? That it may, although the particular estate results to the feoffor, so that it cannot be used in his life, and though it is gone, as to the fee simple: for, 1. This is a real covenant, and affects the land, and goes along with it, and she having the land shall have it. 2. A warranty may be divided, though it be created in fee, (and is not like to a signiory, and mesnalty), 47 Ed. 3, 47. 1 Inst. 390. *Object.* Here the wife is *Cestuy que use*, and comes in by the *post*.

*Answ.* She comes not in merely in the *post*, but partly in the *per*, because she comes in by the limitation of the party, Fitz. Voucher, 25. 3 Co. 62. And in many cases of warranty where the party cannot vouch, yet he may rebut (2). 7 H. 6, 41. 11 Ass. pl. 3. *Object.* The ancestor was not bound, and then the heir shall never be bound (3). *Answ.* Though the warranty was useless in his time, yet there was a lien, Dyer, 69.

*Hopkins pro quer.*—This is not like the case, 1 Inst. 390, where the feoffee with warranty re-infeoffs the feoffor and a stranger, &c.; for there the warranty was attached before the re-infeoffment; but the estate in the feoffor and warranty are *uno flatu*, so that the warranty never vested, nor ever could, because the estate immediately resulted to \* the feoffor; and the wife here shall neither vouch nor rebut, for she is in purely by the statute, and not at all by the party; as if *cestuy que use* and his feoffees had joined in a feoffment after the statute of 1 R. 3, and before 27 H. 8, it shall be the feoffment of the feoffees. 1 Inst. 302 b.

(2) Co. Lit. 385 a.

(3) Co. Lit. 386 a.

Continued, *post*, p. 56.

( C. 38. )

PAINE v. VERDAIN.—In C. B.

S. C. T. Jo. 23.

Action for words.

HE is a presbyterian, and designs and practises against the king and his interest. Adjudged not actionable *per Cur'*, *quia nimis general'* (a).

(a) The words were spoken of an attorney, and so alleged. T. Jo. 23, S. C.

## BUD v. WEST.—In C. B.

S. C. T. Jo. 21.

( C. 39. )

DEBT upon an obligation conditioned not to hunt in the plaintiff's warren. The defendant pleads that he did not hunt in his warren. The plaintiff replies and says, that after the making of the bond, and *ante diem impetrationis brevis, &c. venatus fuit cum retibus*. The defendant demurs; and adjudged against the plaintiff, because he doth not allege where his warren lay, that the defendant might have taken issue; and *Vaughan* said, that *Venatus fuit cum retibus* was nonsense, for it is the dogs that hunt, and not the nets.

Certainty required in a replication assigning a breach.  
16 Viner, 360.

## PORTER v. FRYE.—In B. R.

( C. 40. )

S. C. 1 Ventr. 199. 2 Lev. 21. T. Ray. 236. 1 Mod. 86. 2 Keb. 756, 787, 814, 867.  
3 Keb. 19.

THE defendant was grandchild to the Earl of Newport, and he by his will devises the lands in question to the countess for life, and afterwards to the defendant (1), provided that she marry with the consent of trustees by him nominated; and if she did marry without their consent, then to the plaintiff: she married without the consent of the trustees. The great question was, whether notice ought to be given to her of the condition (a), or whether she ought to take it at her peril?

If a devise be to one upon condition, the devisee must take notice of the condition at his peril.

(1) "And the heirs of her body." S. C. in Ventr.

Argued by *Jones*, that she ought to take notice at her peril, for these reasons:

1. The testator hath appointed no notice to be given; and it was in his power to give the estate upon what conditions he pleased. 2. This condition is annexed to the \* estate, and is contained in the same deed, and the devisee hath the same means to come to the knowledge of the condition as of the estate. 3. This condition is as much within the notice of the party that is to lose the estate, as of him that is to gain the estate: where the party, that is to take advantage of the condition, has not an easier way to come to the knowledge of it than the party that is to lose by it, there shall be no need of notice. 5 Co. *Mallorie's* case. Cro. Eliz. 353. Hob. 14. 18 E. 4, 18. 8 Co. 92. 6 H. 7, 4. Perk. 151. *Obj.* The defendant was an infant at the time of the breach of the condition, viz. fourteen years of age. *Ans.* 1. Though she be an infant, yet she is a purchaser. 2. An infant shall in many cases lose his estate by the breach of a condition. 3. The plaintiff is an infant too, viz. eight years old; and if that be any plea, it is the stronger for the plaintiff (b). Cases ob-

[ \* 32 ]

2 Cro. 391.

Yelv. 122.

Infant bound by a condition annexed to a devise.

(a) That this is not strictly a condition, but a conditional limitation, see S. C. 1 Ventr. 203. Butl. *Fearne's* Cont. Rem. 272-3. *Watkins* Conv. B. 1, c. 15. 4 Burr. 1929.

(b) That a condition annexed to his

estate binds an infant, see 1 Rol. Ab. 421. *Fonbl. Treat. Eq. B. 1, c. 2, s. 5*, and note (g) *ibid.* *Bac. Abr. Infancy, (C)*, and the report of the principal case in *Ventris*.

jected were 8 Co. 89. *France's case*, 2 Cro. 56. 2 Cro. 144. 8 Ed. 4, 1. Cases *pro quer'*, 4 Co. 81. 1 Roll. 463. Cro. Eliz. 577.

*Winnington pro def'*.—Where a penalty is incurred, there notice ought to be given. 22 E. 4. 27, 28. 2 Cro. 391. Winch, 104, 107. Cro. Car. 416.

*Puis, ut audivi, judgment fuit done q'n'est necessary a doner notice; et justices relyont sur Sir Andrew Corbet's case en le 4 Rep. 82 (c).*

(c) Relief was afterwards refused in Equity; see 1 Chan. Cases, 138. 2 Ch. Rep. 26. 1 Mod. Rep. 300. 1 Ab. Eq. 111, and Fonbl. Treat. Eq. B. 1, c. 6, s. 5. As to the point of notice, see *post*, C. 152, 270, 328. Com. Dig. Condition,

L. 8, L. 9. 16 Viner, p. 2, &c. Whether notice be necessary when the devisee is the heir at law, see *Rundall v. Eeley*, Carter, 92, 170. *Mallon v. Fitzgerald*, 3 Mod. 28. 2 Show. 315.

( C. 41. )

MORRIS v. CHAPMAN, *Under-Sheriff of Bucks.*

S. C. T. Jon. 24. Carter, 223.

*Assumpsit* by under-sheriff to execute a writ of *elegit*, and cause certain goods to be found upon inquisition, which he had wrongfully seized under a former writ, is wholly void.

[ \* 33 ]

1 Roll. 16.

*Assumpsit* to do several dependant acts, whereof some are unlawful, is wholly void (a). Seizure of goods under *elegit*, without inquisition, is illegal.

THE plaintiff declares, that whereas he had sued an *elegit* upon a judgment against one Inglesby, and that the defendant being under-sheriff, by virtue thereof had seized several of the goods of Inglesby, and the defendant, in consideration that the plaintiff would prosecute another writ of *elegit*, and deliver it to him, did assure and promise, that he would cause the writ to be executed, and those goods to be found upon an inquisition, and would deliver them to such person as the plaintiff should authorise; and avers, that he did sue out a writ, and authorise J. S. to receive them. The defendant pleads, that the persons authorised gave notice to Inglesby, and so the doors of the house were shut, that he could not enter and seize the goods. The plaintiff demurs. 1. It was held, that the plea was idle and vicious; but the great question was, whether the promise was not void. It was urged by *Nudigate*, that the thing was lawful, because it is no more \*than is his duty, to cause an inquisition to be found when a writ is delivered to him; but the Court took a difference between finding an inquisition and promising to find such goods upon an inquisition; for there the sheriff seems to interest himself, and engage that the jury shall find such goods to be the goods of Inglesby. It was farther objected, that here being an *assumpsit* to do several acts, although one might be unlawful, yet the neglecting to perform that part that was lawful, viz. the executing the writ, was sufficient cause of action. It was answered by the Court, that although they be several acts promised, yet they are dependant upon one another, and are as it were the same act; for the finding of the goods must be by execution of the writ. It was farther resolved, that the seizing of the goods upon the first *elegit* without a jury was illegal, and the sheriff was therein a trespasser; and then shall it be intended, that

(a) Com. Dig. Action upon the Case *Clarke*, 2 Ventr. 223. *Chater v. Beckett*, 7 Term Rep. 201. upon *Assumpsit*, F. 4. *Lexington v. ett*, 7 Term Rep. 201.



when he makes this engagement he becomes an indifferent person, and the rather, because he was thereby to excuse his own trespass? Moreover, a sheriff is a person that hath a great power over and influence upon juries; for he returns whom he pleases, and can adjourn them from day to day till the verdict please him; and if he do not carry himself indifferently, the law will incline to an ill construction of what he doth. *Jud. pro def'*.

The Roll is Mich. 23 Car. 2. 2 Rot. 786.

## ANONYMUS.

( C. 42. )

ACTION of trespass for taking the plaintiff's hogs. The defendant justifies by virtue of a custom to take 4*d.* for all that pass, &c. unless they be bred or kept upon duchy land. The plaintiff replies, that they were kept at Sudford in Leicestershire, which is duchy land; and issue upon that; and the venue came from Northampton, where the action was laid. It was moved that the venue should have come from Leicestershire, the place where the land lay. It was answered, that that was the proper place; but judgment was given for the plaintiff by virtue of the new statute (1), because the issue was tried in the proper county where the action was laid (a).

Mistrial aided after verdict, where the issue was tried by a jury of the county in which the action was laid. *Vid. post*, p. 191-2, 410, 437.

(1) 16 & 17 Car. 2, ch. 8.

(a) See *Craft v. Boite*, 1 Saund. 246, and notes 1, 2, and 3, *ibid.* by Serjeant Williams. Where a mistrial is not cured by verdict, see *Goodright v. Williams*, 2 Mau. & Sel. 270.

## DE TERM. S. TRINITATIS, 1672.

[ 34 ]

## IN COMMUNI BANCO.

SIR JO. TUFTON v. SIR RIC. TEMPLE.

( C. 43. )

S. C. Vaugh. 1.

QUARE *impedit* for the church of Burton Bassett in the county of Warwick.

The manor of B. B. was divided, and the defendant had two parts of it, and the plaintiff the third: and the plaintiff set forth, that the right of presenting every third turn was appendant to his third part, and that it belonged to the defendant to present twice, by reason of his two parts; and so sets forth, that the defendant had presented twice, and so it belonged to him to present now. The defendant says, that the whole advowson did belong to him, *sans ceo* that one turn was appendant to the plaintiff's third part.

The plaintiff demurs generally. The objections were two.

*Baldwin pro quer'*—1st *Obj.* In a *Quare impedit* the defendant cannot traverse the plaintiff's title without making a title to himself. For,

In a *quare impedit*, where the defendant's clerk has been instituted and inducted, he is not an actor, and therefore needs not state a formal title, with a presentation, in himself, (Vaugh. 7, 8). Where the plaintiff's title is derived solely from the appendancy of an advowson to a manor, the

appendancy is  
traversable (a).  
Vaugh. 16, 17.

[ \* 35 ]

1. In a *Quare impedit* the plaintiff and defendant are both actors, and the defendant shall have a writ to the bishop, as well as the plaintiff; and if the defendant never appear, the plaintiff must make himself a title; and so must the defendant, if the plaintiff be nonsuit; in all cases the defendant makes a title to himself, where he counter\*pleads the title of the plaintiff. Hob. 163. 13 H. 8, 12. 10 H. 7, 27. 11 H. 7, 29. 21 Ed. 4, 1. Bro. Quare Imp. 138.

*2d Obj.* The defendant ought to have traversed the presentment, and not the appendancy; for though in some cases it may be done, yet that is when the appendancy is material, and when the defendant must set forth a title. 10 H. 7, 27. 20 E. 4, 13. 21 E. 4, 1, 2.

(1) *Vid.* 5 Co.  
93. Cro. El.  
518.

A presentment with institution and induction makes a good title to the plaintiff without more ado. Hob. 102. And therefore if he sets forth two presentments it is a double plea (1). 24 E. 3, 77. Bro. Quare Impedit 101, 112, 129, 125. 10 H. 7, 27. 1 And. 269, 270, which was the authority that he chiefly relied upon.

Booth, 230.  
Doderidge's  
Engl. Lawy.  
p. 109, 110.  
*Post*, C. 50.  
Hob. 163.

*Ellis pro def.*—It is always necessary for the plaintiff to allege a presentment (Nat. Brev. 34) in this action. If the defendant stands in need of a writ to the bishop, he must make a title; but it is not always necessary for him to make a title, for he may plead *Ne disturba pas*, as he may in a replevin (where both parties are actors) *Non cepit*; but here is no need of a writ to the bishop, and then there is no need to make a title. (Note here, that the defendant's clerk was instituted and inducted). 2. This is a plea in bar, and so is good to a common intent; and the making a title is but matter of form here, for it cannot be traversed; and this being a general demurrer, the plaintiff shall not take advantage of it. 3. Here, upon the whole record, doth appear a good title to the defendant, for he sets forth that the whole advowson did belong to him, &c.

1 Ld. Raym.  
41. 1 Saund. 22,  
note (2).

*Adsecundam Obj.* The traverse is well taken. 1. This destroys the main part and substance of the plaintiff's title; for the presentment is but an effect of that, and springs from that root, so that this traverse is like laying the axe to the root; for if it be not appendant the plaintiff hath made no title. 21 Ed. 4, 1.

2 Saund. 206,  
n. (22); 207 n.  
n. (24).

2. He that pleads is presumed to be best conusant of his own title; and if he will plead more specially than he needs, his adversary shall take advantage of it, and shall be permitted to traverse the special matters, Hob. 103, 321, (though it be not material). Dyer, 312, 365. And if it had not been necessary to set forth the appendancy, yet, when it is set forth, I may take advantage of it, and traverse it.

(a) But where the presentation alleged by the plaintiff gives him a title by usurpation independently of any other title, the presentation must be traversed; for any other title alleged by him be-

comes immaterial. Vaughan, 9, 10. See further, Com. Dig. Pleader, 3 L. 9. Booth on Real Actions, 237, 17 Viner, 454, &c.



3. If the advowson be not appendant, the plaintiff hath no title, for he hath alleged the last presentation in us; and if he had gained a title by former presentations, yet when we presented again, we are remitted. 1 Inst. 363. Nat. Brev. 35.

\* He differenced this case from that in (1) 1 And. 269, because there was a special demurrer, and so might take advantage of matter of form. 2. There the defendant made a title to an advowson in gross, and then the presentment makes the title; but where it is appendant, the appendancy makes the title, and therefore must be traversed; and it hath frequently been so, as appears, Dyer, 260. Cro. Car. 61. Hob. 321. 10 Co. *Chancellor of Oxford's case* (b).

[ \* 36 ]  
(1) *Vid. Leon.*  
154.

(b) See the judgment in Vaugh. Rep.

MAYOR AND ALDERMEN OF ST. ALBANS *v.* DOBBINS.—In C. B. ( C. 44. )

THEY declare, that there was an antient custom in the said borough, that no man should exercise any trade, mystery, or science, &c. unless he were a freeman, or did work with a freeman; and the king incorporated them by the name of mayor, burgesses, and aldermen, and gave them power to make laws for the good of the corporation, and that no foreigner should trade there; and so set forth that they did make a bye-law, that every man that did use any trade, &c. not being a freeman, and not working with a freeman, should forfeit 2s. for every day, to the mayor and aldermen, to the use of the corporation; and that the law was allowed by the Lord Chancellor and Lord Chief Justice, *secund'* 19 H. 7, 67, and so set forth that the defendant did use the trade of an apothecary for 400 days, not being a freeman, &c. and so demand 40*l.* and allege that the defendant had notice of the custom.

Whether a bye-law in pursuance of a custom in a borough, "that no man shall exercise any trade, mystery, or science, &c. unless he be a freeman, or work with a freeman," be valid (a); and in whose name an action thereon should be brought (b)?

*Browne pro quer'*, *et il dit*,—1st, That the custom is unreasonable and void; for,

1. It doth exclude the use of all trades whatsoever.

*Post*, p. 116.

2. All mysteries and sciences are within the custom, and so are all liberal sciences, as law, physic, &c. But to that it was answered by *Ellis*, that sciences shall be taken *secundum materiam subjectam*, and shall be intended here a trade, &c.

3. It doth exclude all men from using their trades there, although they have served an apprenticeship there, unless they be made free, or work as journeymen, which is absurd, as Hob. 211; and perhaps nobody will set them on work, and the corporation will not make them free. But to that it

(a) That a bye-law in restraint of trade is good, when it is supported by a custom, see 8 Co. 125 a. Com. Dig. By-Law. B. 3, C. 3. 4 Viner, 303, 304. T. Ray. 295. 1 Burr. 12, 16. 3 *Id.* 1858. 4 *Id.* 1951. 4 Barn. & Ald. 438; and

see Willes, 384, 388, notes. Com. Dig. Trade, D. 2. 1 Saund. 312 c. note (3) by Williams. *Adley v. Whitstable Company*, 17 Vesey, 322.

(b) Willes, 384. 1 Wils. 253. 2 *Id.* 266. 1 Bos. & Pull. 98.

was answered, if the corporation refuse to make them free when they have served their time, they have a good action, and other remedies. *Per Vaughan (c).*

[ \* 37 ] \* *2dly.* The king's charter doth but corroborate the custom, and then if the custom be void it is no custom, and then the king's charter cannot operate upon it; and the king's charter of itself cannot enable them to make laws that shall bind foreigners; neither can a custom to make bye-laws, unless it be particular for that purpose.

*3dly.* Admitting there were a duty, yet the action is not well brought in the name of the mayor and aldermen, without mentioning their names; for it is not brought in their politic capacity; for they are incorporated by the name of mayor, aldermen, and burgesses; neither is it brought in their natural capacity, because they are not named; so that the defendant is at a great mischief; for if he had had a verdict for him, he could not tell whither to go for his costs; for there is no such corporation, and the persons are not named by their own names.

*4thly.* It is not said in their charter, whither the fine shall go; and then it shall be to the king, 8 Co. 119: and so they have no right to it.

*Post*, p. 64,  
320.

It was answered to the first objection that the custom was good enough; for whatsoever may be constituted by a law, and that law not void, will be good by custom; for a custom supposes a law, though it cannot be found. Hob. 198, [*quære*, 86?]. 6 Co. 60.

As to the third objection, it was answered by *Ellis*, that the like case had been adjudged in the Exchequer, where the gardeners about London were incorporated, and made bye-laws, and the wardens brought an action for breach; and adjudged to be well brought; *sed dubitavit Curia*. But it is common for corporations to sue without naming their own names, *prout patet per* 21 Ed. 4, 66. 4 H. 7, 32. 39 E. 3, 13. 17 E. 3, 17. Dyer, 160. 5 Co. 81. 13 Ed. 4, 8. *Curia advisare vult*.

(c) A *mandamus* lies, *Townsend's case*, 1 Lev. 91. *Wannell v. Chamberlain of London*, Stra. 675.

( C. 45. )

HALLELY v. GASER.—In C. B.

The heir cannot recover rent due in the lifetime of the ancestor.

When the King grants over a rent-service he cannot empower

[ \* 38 ] the grantee to distrain.

THE case was: King Charles the First was seised of the lands in question, and granted the lands to *Curteene* in fee, reserving a rent of 220*l. per annum*, with clause of distress; and so the plaintiff sets forth, that the king granted this rent to the Earl of Pembroke and Sir Robert Pye, and granted that they should distrain for it; and that the Earl of Pembroke died, and Sir Robert survived; and then Sir Robert died, and the rent descended \* to Sir Robert, the son; and the defendant avows as bailiff to him.

The plaintiff confesses the whole matter; but says, that

the Earl of Pembroke discharged this rent in his lifetime, after it became due; and thereupon the defendant demurs; and shows for cause, that here is a discharge pleaded, and does not say how he did discharge (1); and he ought to have said that he did it by deed, or to have set forth how, that the Court might judge of the sufficiency of the discharge; which ought to have been done if the discharge had been material. But here it was resolved, that the avowry was naught; because it was for a rent due in the life of the ancestor, which the heir could not sue for at the common law; and he is not enabled by the statute (2); for that only speaks of executors; and the avowant does not say when it descended to him, so that it might appear whether it were due or not; and the Court said, as this case is, the ancestor had no power to distrain; for when the king grants land in fee, reserving a rent, this is a rent service; for the king is not within the statute of *quia emptores terrar'*; and the addition of a clause of distress makes it not a rent-charge, for a distress is incident of common right to a rent service; and then when the king granted over this rent it became seck, and he could not empower the grantees to distrain for it (a): and there was another fault in the avowry, for the rent was 220*l.* and he avows only for 60*l.* for half a year's rent, without saying that the rest was satisfied. *Jud' pro quer' (b).*

(1) Hob. 296.  
Post, C. 260.

(2) 32 H. 8,  
c. 37.

The king is  
not within the  
stat. *quia emp-  
tores.* Hargr.  
Co. Lit. 143 b.  
n. 5.

3 Cro. Car. 436.  
2 Cro. 499.

- (a) *Vid.* Lit. s. 225. *Ante*, C. 1, note by Serjeant Williams. *Id.* 286, note (10).  
(b). 4 Geo. 2, c. 28, § 5. 2 Dougl. 624. *Cobb v. Bryan*, 3 Bos. & Pul. 348, *Forty v. Imber*, 6 East, 434. *Hurrell v. Wink*, 8 Taunton, 369. *Tutthill v. Roberts*, post, p. 344.  
(b) Acc. 4 Mod. 402. 1 Saund. 201 a.  
n. (1). *Sed vid.* 1 Saund. 285 b. note (8)

### THOMAS KING *v.* ROTHAM. — In C. B.

( C. 46. )

THE plaintiff declares, that the defendant distrained his horse, &c. and he replevied, and the defendant distrained his cattle again in the same place *eddem occasione*.

Plea to a writ  
of recaption.

The defendant says he did distrain his cattle *alid occasione*, *absque hoc*, that he did take again in the same place *eddem occasione quid prius*. The plaintiff demurs, because the plea of the defendant is *multiplex, repugnans*, &c.

*Wilmot pro quer'*. — 1. This amounts but to the general issue; for the general issue is *quod non cepit averia prout prædictus querens versus eum queritur (a)*. It was answered *per Cur'*, that he could not take advantage of that but upon a special demurrer, and this was general.

Plea amount-  
ing to general  
issue cannot be  
objected to on  
general demur-  
rer. Com. Dig.

\* 2. Here is a negative pregnant; for he says *quod non cepit* — *in prædicto loco*, and if he took them in any other place for the same cause, the action would lie. (*Ad quod nil fuit dict'*). *Vide Bro. Neg. Preg.* 51. 24 H. 6, 9. 27 H. 6, 7.

[ \* 39 ]  
Pleader, E. 14.  
1 Show, 76.  
Post, C. 49, 52.

(a) See the form in Lib. Intr. fol. 57-8. Rast. Entr. tit. Recaption.

Bro. Recap.  
pl. 2, 3.

Plaintiff needs  
not shew that  
which lies not  
within his own  
knowledge.  
Com. Dig. Plead.  
C. 26. 3 Term  
Rep. 768. 13  
East, 112.

Demurrer  
admits nothing  
but what is well  
pleaded. *Post*,  
p. 199. Hob. 233.  
1 Ld. Ray. 18.

Special plea  
amounting to  
general issue is  
only matter of  
form. Hob. 127.  
1 Leon. 178.  
Gilb. C. P. 61.  
1 Ld. Raym.  
641.

3. The defendant ought to have shewed for what cause he took them, for it was issuable; and here he says *aliá de causá*, and does not say what, so as it is impossible for a jury to try it. 11 H. 6, 8, 9. 45 E. 3, 4. 47 Ed. 3, 7.

*Nudigate pro def.* — 1. He said the declaration was nought, because he ought to have shewed for what cause they were first taken. *Ans. Per Cur.* — It is impossible for him to know it, and so not proper for him to shew it.

2. He should have concluded *contra pacem* and *contra statutum* (b). *Per Cur.* — It is at his choice, unless it be a particular statute, that the Court is not bound to take notice of unless it be pleaded (c).

3. The demurrer hath admitted the fact to be as it is pleaded; and then it is confessed that they were taken *aliá occasione*. *Ans. per Cur.* — A demurrer admits nothing but what is well pleaded.

*Vaughan* said, — In actions that are very rare, the Court will allow of a special plea that amounts but to a general issue; for it is not contrary to law, that a man should plead the special matter, for he may as well plead it as give it in evidence; but it is a thing that the judges in discretion will not allow of, to avoid prolixity of pleading; and is but matter of form, and therefore no advantage shall be taken of it upon a general demurrer. The defendant paid 40s. costs, and had liberty to mend his plea (d).

(b) *i. e.* The stat. of Merton. *Vid.* rally, 5 Viner, 551.  
Registr. 86.

(c) *Sed vide* Doctrina Placitandi, 382. (d) On the writ of recaption, see further, F. N. B. 71. Gilbert Distress, *Lee v. Clarke*, 2 East, 333; and gene- (Hunt,) 233.

( C. 47. )

THE KING v. WILLIAMSON. — In C. B.

A Dutch merchant, after trading in this country for many years, becomes an alien enemy in consequence of a war with the Dutch, and dies: *quare*, whether the King can recover his

[ \* 40 ]  
goods after the restoration of peace?

(1) 1 Salk. 46.  
1 Aik. 42.

THE King brought an action of trover and conversion for goods that the defendant had of an alien enemy. Upon a special verdict the case was, one Depluvier, that was a Dutch merchant, had traded here for twenty years, and in the year 1664 there was war proclaimed between us and the Dutch; in 1665 Depluvier died; in 1666 or 1667 the declaration and articles of peace were published, and the goods of Depluvier came to the hands of the defendant; the conversion was laid to be 1 April, 20 *Regis nunc*. The question was, whether this action would lie.

\* *Maynard pro Rege.* — 1. It is agreed, what is asserted in *Calvin's* case, 7 Co. 17, that an alien friend is not capable of having lands, but goods he may have, &c.; and *vide* 1 Inst. 2 b; but he denied (1), that an infidel is *perpetuus inimicus*, but if the king please, he may be in amity and league with him.

If any man get the goods of an alien enemy in the act of war, he may retain them; but if the king be in person in the field, he shall have them, whoever takes them (a), 27 H. 3, memb. 11. A subject took a ransom for prisoners that he

(a) As to the property of booty captured in war, see *Lindo v. Rodney*, Dougl. 614-5. 2 Browne's Admiralty Law, 262, &c. *R. v. Brown*, 12 Mod.

had taken in the war, and the king sued him in the Exchequer for it (2).

If an obligee alien becomes an enemy, the king shall have the obligation. Dyer, 2, pl. 8. 19 Ed. 4, 6. 1 Roll. 195. Cro. Eliz. 142. Ow. 45. An alien enemy executor shall not have an action of debt *coment soit en auter droit* (3).

If any subject seize the goods of an alien enemy, he may defend himself against the alien (4), but not against the king. Rastal, tit. Eject. Fitz. 7. 32 H. 6, 23. He cited several records that are not printed. Trin. 30 Eliz. Rot. 1125, in B. R. Hil. 3 Car. 1. An information was brought for the money and goods of Don De Luna, an alien enemy, and it well lay, 24 Ed. 1, Pasch. Process was made to the sheriff for certain debts that were owing to an alien enemy. Trin. 24 Ed. 1, Rot. 63. Process was made to the sheriff for certain debts owing to an alien enemy (5). Mich. 22 Ed. 2. *Bona mercatorum Franciæ forisfaciuntur domini regi*. Whensoever a title accrues to the king at the same time as it does to a subject, there the king's title shall be preferred, and priority shall not prevail against him (6); *Quia nullum tempus occurrit regi*. 2 Co. Bingham's case. If a man holds of two lords, one by priority, and the other by posteriority, and the posterior lord conveys his seigniorship to the king, the king shall have the wardship of the whole: and he said, for personal things there needs no office, but as soon as the property of the alien ceases, they vest in the king; and for the declaration and articles, viz. that aliens should be as safe in their goods and estates, as if the war had never been, he said here was no such person to dispense with, for the alien was dead, and the defendant here is one of the king's subjects.

There were three authorities urged against him, 7 Ed. 4, 13, 14; but he said that was only the note of the reporter, and did not arise out of the case; and for that of 2 H. 7, 15, there Keble only puts the case of 7 Ed. 4. Moor, 325.

\* *Nudigate pro def'*.—1. The king had never any property; for though war was proclaimed, yet it is found that he traded here, and never did any act of hostility (b); and if he had, yet the goods being seized by a subject, 2 R. 3, 2, it is said to be *legalis captio*. *Obj.* *Nullum tempus occurrit regi* (7). *Ans.* If the king's title be transitory, *tempus occurrit regi*, 7 Co. Baskervill's case, in case of lapse: And so if an estray come into the king's manor, and escape into another manor, and continue there a year and a day, the king has lost his property, *auterment est* where his interest is permanent.

2. Admitting the king had a property, yet before seisin, or an inquisition, he cannot bring an action. 2 Inst. 227. If a man adhere to the king's enemies, and die in rebellion, his

(2) 2 Bl. Com. 402. 2 Viner, 263. Wentw. Exors. p. 56, ed. 1663. Hargr. Tracts, p. 248.

(3) Gilb. C. P. 206. Toller, Exec. B. 1, c. 2, § 1.

(4) Finch L. 178. 2 Bl. Com. 401.

(5) 1 Taunt. 29. 6 Taunt. 239. 1 Hale H. P. C. 95.

(6) Bac. Abr. Prerogative, (E) 4.

(7) Com. Dig. Prerogative, D. 86. Harg. Co. Lit. 119 a. n. 1.

135. *Morrough v. Comyns*, 1 Wils. 213. Hargrave's Law Tracts, p. 245—248.

(b) As to the situation of aliens residing here without molestation after a

proclamation of war, see Harg. Co. Lit. 129 b. n. (3). Fost. C. L. 185. 7 Mod. 150. 1 Lutw. 35. 1 Taunt. 36-7. 2 Campb. 163. 3 *Id.* 245.



goods are forfeit, but there must be an office. 7 H. 4, 27. Dyer, 128. Stanf. Prærog. 54, 55. 9 Co. 96 (c).

3. However the party shall be discharged by the declaration and articles, which say, they shall be as if the war had never been; and if the war had never been, no doubt the king could not have maintained this action: and then he hath laid his possession after the time of the articles, when he had dispensed with his right; and in case of restitution *benignissima erit interpretatio*. 4 H. 7, 10. 19 H. 7, 22. 11 Co. 96. Moor, 431. And it would be a great discouragement to trade, if persons that are trading here, and do no acts of hostility, should presently, upon the proclamation of war, forfeit all their goods: but *Vaughan* said they must have convenient time to remove (d).

1 Hale H.P.C.  
160. 1 Bl. Com.  
257. Fost. C. L.  
219. 11 Ves.  
junr. 292.

(8) 1 Saund.  
361. S.C. 2 Mod.  
53. 3 Mod. 242.  
Post, p. 198.

It was said that it is not requisite to declare war, for if it be *bellum a parte gestum*, every body is to take notice of it. *Vide Owen*, 45. Cro. El. 142.

*Tombes's* (8) case was cited by Justice *Wild*, where the consequence of a statute became *felo de se*, and then there came an act of oblivion: it was the opinion of the Judges, that the cognizor shall retain the money, for the king has dispensed with his right, and there can be no executor nor administrator. *Adjournatur* (e).

(c) On the necessity of an inquest of office, see *Attorney-General v. Weeden, Parker*, 267. 16 Viner, 80, &c. 3 Bl. Comm. 253.

(d) See Mag. Chart. 2 Inst. 58. Bac. Abr. Mercht. (A). 27 Ed. 3, st. 2, c. 17.

*Beawes*, tit. Merchts. 1 Hale H. P. C. 93.

(e) See the resolutions in the case of *Attorney-General v. Weeden & Shales*, *Parker Rep.* 267.

## ( C. 48. )

## RAYNOLLS v. WOOLMER.

The vendee of lands may sue on a covenant for title, although the sale [ \* 42 ] have previously become void by the nonpayment of money on a certain day.

THE defendant sold lands to the plaintiff, and covenanted that he had a good title and right to sell; and there was a proviso in the deed, that if 100*l.* was not paid at a future day, that the grant, and bargain and sale, and all should be void: the money was not paid at \*the day, and so the estate was void; but yet the plaintiff brought an action of covenant, for that the defendant had no right to sell; and the defendant demands *oyer* of the deed, and demurs. The question was, Whether, the estate and all being void by the non-payment of the money, an action of covenant would lie? And the Court inclined it would; for there was a right of action attached in the bargainee immediately upon the sealing of the deed, which cannot be divested by the non-payment of the money; for he might have brought his action as soon as the deed was sealed. *Vide Cro. Eliz.* 244, 77. *Dyer*, 56, 57. But if the words had been, "the indenture shall be void," it would have been stronger against the plaintiff; for then there would have been nothing to ground his action upon (a).

(a) *Vide Northcote v. Underhill*, 1 Salk. 199. Com. Dig. Covenant, F. Post, C. 187, 609.

## FOX v. GRUNDIE.

( C. 49. )

S. C. Post, C. 52, p. 43.

TRESPASS(1) for taking away *decem carectatas tritici*. The defendant pleads that the land *in quo* was the land of one *Adamson*, and that it was sowed with corn, and the corn was cut, &c. and the tenth part was severed from the ninth, and that he took it as servant of J. S. who was farmer of the rectory. The plaintiff demurs, and shews for cause, that this plea amounts but to the general issue, because he had given no colour to the plaintiff, nor left room for a possibility of his title; being it was shewn for cause in the demurrer (though it be but matter of form yet) he shall take advantage of it: and here the defendant hath nothing to rejoin. *Per Wild.*—For he cannot say *de injuria sua propria*, &c. because the defendant hath pleaded matter of interest in another. It was objected that the defendant ought to have shewed how he was farmer, and to have shewed the deed. But, *per Cur'*, it is good enough to say he was *firmarius* (b); but if he had said it was by deed, he ought to have shewed the deed (c). 10 Co. 92. *Vide Case 52.*

In a plea, justifying an entry to take tithes, defendant needs not shew *how* he is farmer of the rectory: but if he states a title by deed, he must shew the deed.

(1) i. e. Tresp. *quare claus. fregit.*

10 Co. 88.

*De injuria sua propria* is a bad replication when defendant pleads matter of interest in another (a).

(a) Herne Plead. 803-4. 8 Co. 67 a. Cro. El. 539, 540. Willes, 99. 1 Bos. & Pul. 80. *Atkins v. Hutchinson*, post, p. 540.

Term Rep. 635. 4 *Id.* 367. But see the precedents in Winch. 1103. Herne, 803, 819. 9 Wentw. 302, 317; and Bro. Abr. Pleadings, pl. 117.

(b) Cro. Jac. 361, 437. *Crawly v. Thorn*, Trial per Pais, 413, 7th edit. 3

(c) 2 Mod. 64. Post, C. 50.

## LONDRE v. MOHUN.—In C. B.

( C. 50. )

THE defendant avows, for that J. S. was seised, who by deed indented let the land for life, reserving a rent; and there was a covenant in the deed to levy a fine, &c. J. S. dies, and the reversion descends to three sisters, who make partition, and make several avowries \*for their parts; two of them set forth their relations, and how the land descended to them, viz. as daughter and heir; but one said only that J. S. died, and the land descended to her, and did not shew how she was related; and this, by *Atkins*, was a fatal objection; for an avowant is as an actor, and ought to shew his title, and how it accrues; and of that opinion was the whole Court; and for that reason gave judgment against her for her part (a).

An avowry, stating a title by descent, must shew *how* the avowant is heir.

[ \* 43 ]

It is not necessary to shew the deed of demise in an avowry for rent-service: *aliter*, in case of a rent-charge.

An avowant is an actor, and ought to shew his title.

*Ante*, p. 35.

Yelv. 148.

1 Saund. 347 b.

n. (3).

(1) 3 Term Rep. 156. 2 H. Black. 262.

2d. Object. The defendants avow for a rent by deed, and do not say *profer' hic in Curia*. *Ans. per Nudigate*, that the deed does not belong to them; for here being a fine to be levied, the conusee of the fine shall have the deed, and not the *cestuy que use*, and for that cited Cro. Car. 442 (1). But to that it was replied, that it may be so when no estate passes till the levying of the fine; but here the estate passes by the deed, and only a covenant to levy a fine by way of cor-

(a) *Denham v. Stephenson*, 1 Salk. 355.

In pleading a lease for life, livery shall be intended. Co. Lit. 303 b. 5 Barn. & Ald. 507.

roboration. *Nudigate*.—The estate cannot pass by the lease, because it is freehold, and here is no livery found. *Archer*.—Livery shall be intended, according to *Vynior's* case, 8 Co. 82. *Per Curiam*.—It is not necessary to shew the deed, because the deed is not material to the title; for it is enough to say *quod demisit*; but if it had been for a rent-charge granted, &c. that he could not have a title to but by deed, he must have shewed it (b); and so two of them had judgment that had well conveyed their titles.

(b) *Ante*, C. 49. *Post*, C. 174. *Warren v. Consett*, 2 Ld. Raym. 1503. *Atty v. Parish*, 1 New Rep. 109.

( C. 51. )

MEDLIFF & UX' v. BUCOLD & UX'.—In B. R.

*Semb. S. C. Bedniffe v. Pople*, 1 Ventr. 220. 2 Lev. 63. 3 Keb. 58.

Suit in Ecclesiastical Court for calling one "a whore," not prohibited. 17 Viner, 591-2.

PROHIBITION moved for to stay a suit in the Ecclesiastical Court for calling a woman whore; and denied *per Curiam*, because she has no remedy but in the Ecclesiastical Court, and it is a great defamation. 2 Roll. 296. Jon. 44 (a).

(a) *Post*, C. 53, 342, 347, 347 b. 353, 350, 362.

( C. 52. )

FOX v. GRUNDIE.

*S. C. ante*, C. 49, p. 42.

Plea of entry to take tithe needs no colour (Doctr. Pla. 76) although it contain an impertinent allegation of title to the [ \* 44 ] land in a third person.

THE plaintiff moved for judgment, *mes judgment fuit done pur le def'*; for *per Vaughan* here needs no colour, here being room left of a title for the plaintiff; for though the defendant says that the land was one Adamson's, yet he had nothing to do to plead that; and then the case is no more but if I set out tithes upon my land, and he that fetches them away justifies as servant to the rector, &c. \* this is a good plea, because here is a trespass for coming upon my land; but it is justifiable: and here the defendant could not plead the general issue, for when the defendant intitles a stranger, and justifies by his commandment, he must plead it, and cannot give it in evidence upon the general issue, *quod vide Bro. General Issue*, 81. 25 H. 8. *Atkins* was of a contrary opinion, because the defendant hath by his plea quite destroyed the plaintiff's title by affirming the right of the close where, &c. to be in Adamson: so that there is no possibility of room left for the plaintiff; and so he ought to give colour, *mes per le opinion de Vaughan et Archer judgment fuit done pur le def', Wilde absente* (a).

Want of colour is only cause of special demurrer.

It was affirmed by *Townsend*, that he that demurs for want of colour must shew it specially that colour is wanting (b).

(a) But the plea of *liberum tenementum* in another and entry by his command requires no colour. (Doctr. Placit. 76, 78. Finch Law, 379, 380). It may

be shewn under the general issue. *Argent v. Durrant*, 8 Term Rep. 405.

(b) *Ante*, C. 46. *Sed vide* 1 Ld. Ray. 551-2. *Vid.* 4 Ann. c. 16.



## DAVIE v. DORIE.—In C. B.

( C. 53. )

PROHIBITION moved for, for that the defendant sued in the Spiritual Court for saying these words, "thou art a cuckold, and a cuckoldly knave, and a cuckoldly rogue," and cited Cro. Car. 110; but it was denied *per Curiam*; for there cannot be a higher defamation; for it does not only defame the husband, but also scandal the wife; for if the words be true, she must necessarily be a whore; but if the words had been spoken adjectively only, as "cuckoldly knave," there perhaps it might have been otherwise (a).

(a) *Contr.* Cro. Car. 339. 2 Rol. Ab. 296.

Suit in Ecclesiastical Court for calling one "a cuckold," not prohibited. Cro. Car. 339. Lutw. 1038. *Sed vid.* 1 Sid. 248. Salk. 692. 2 Lev. 66. 1 Kebl. 890. 17 Viner, 593. 1 Stra. 471, 545.

BULKLY v. HOARE, *alias* EARLESMAN.—In C. B.

( C. 54. )

*Semb.* S. C. 1 Mod. 186.

DEBT upon a bond against the defendant as administrator of the obligor. The defendant pleads that the plaintiff had a statute-staple(1) of 100*l.* against the testator, and that he had but 40*l.* assets, which was not sufficient to satisfy that statute. The plaintiff replies that the statute was burnt. The defendant demurs; and it was argued by the plaintiff, that a statute that is not in being shall not be pleaded in bar to an action of debt upon bond; and though the statute be inrolled, yet the party can have no benefit of it if the *scriptum obligatorium* be lost (Dy. 180); and so to him it is as if there were no statute at all: but it was answered, that although the *scriptum obligatorium* be lost, yet as to him that pleads it, 'tis all one; for if so be \* the plaintiff had replied there had been no such statute, the defendant, if they had been at issue, could not have produced the *scriptum obligatorium*, but must have had it certified out of Chancery; and there are writs in the register to that purpose; and the difference is, when the party himself that is the conuzee is to make use of it, he shall not take advantage, but by producing the *scriptum obligatorium*; but a stranger may have it certified without that when he pleads it(2). *Atkins, Justice.*—It will be a hard case for the plaintiff, if so be the truth be that the statute is burnt, that yet it shall be in being to bar him of his debt upon the obligation, and yet he is utterly incapable of having any benefit by it, so that he shall lose both his statute and obligation too. *Vaughan, Justice.*—The inconvenience will be as great on the other hand; for if the plaintiff should recover upon this obligation, perhaps he may be sued afterwards upon the statute, which for all that he knows may be in being. *Atkins, Justice.*—Then he should have traversed it, and then it might have been tried(a). *Curia advisare vult.* *Nota q' un action de debt*

To debt on bond, an administrator pleads an unsatisfied statute-staple: a replication "that the statute was burnt," held good. (1) Statute merchant, 1 Mod. 186.

[ \* 45 ]

(2) 2 Stra. 1034.

Debt lies on a statute-staple

(a) The plaintiff had judgment by the opinions of three justices against Vaughan. S. C. 1 Mod. But supposing the statute in this case to have been burned by accident or without the consent of the ob-

ligee, the present practice of the courts (which dispenses with the necessity of a profert in such instances) would lead to a different decision.

under the seal  
of the party.

*poet estre port sur statute-staple q' est seale ove le seale del party (b).*

(b) *Acc.* Aston Ent. 223, 237. 2 Mod. the seal of the party is not affixed. 1 Ent. 243. Cro. El. 494. But not where Rol. Ab. 599. Gilb. Debt, 394-5.

( C. 55. )

FOX E v. SMITH.

Where the wife is endowed of a moiety of copyhold lands descendible in the nature of gavelkind, and two sons by different venters are admitted to the reversion of that moiety, and the son by the second venter dies; the admittance shall not cause a *possessio fratris* in him, so as to make his sister take (a).

3 Leon. 69.

[ \* 46 ]  
8 Term Rep.  
213. *Post*, p.  
498-9.

Cro. Car. 411.

WILLIAM Remer was seised of copyhold lands that were descendible *secundum* gavelkind; and the wife endowable of a moiety. W. has issue Henry by one venter, and Joseph and Elizabeth by another venter: William dies, the wife enters into a moiety, the two sons enter into the other moiety, and were admitted to the reversion of the wife's moiety: Joseph, the son by the second venter, dies; the wife dies. The question was, Whether this admittance to the reversion shall so attach it in the brother, as that the sister shall have it before the half-brother: and it was argued by *Waller*, that she shall not; for it is found, that after the death of the father the mother entered, and so the son was never seised; so that this case is stronger than the case 1 Inst. 31 a. where the son enters, and endows the mother, and yet that shall so defeat his possession, that there shall be no *possessio fratris*. *Baldwin* for the defendant, the daughter: for it being found that the son was admitted, it shall be intended according to the custom, and then the estate shall be guided by the custom, and not by the rules of common law: and he cited two cases, where the attaching of a reversion upon an estate for life does seem to be a sufficient seisin to convey the land to the heir of him in whom the reversion was so attached, viz. Cro. Car. 411. Roll. tit. Discent, 623. *Godfrey v. Bullock*. And *Vaughan* said,—All customs are contrary to the common law, and therefore shall be taken strictly; and here is no custom found that a reversion shall descend in gavelkind (b). And *Atkins, J.* said,—That in those cases cited by *Baldwin*, there was no maxim of the common law as here is, viz. *possessio fratris*, &c. and then he that takes advantage of it must be qualified according to the common law. Judgment *contra (la file) def' nisi causa.*

(a) Hence it is the entry and not the admittance which occasions a *possessio fratris* of a copyhold. Dy. 291, pl. 69. Watk. Copyholds, 1 Vol. p. 387, 2d edit. Watk. Descents, p. 69, 81, notes, 3d edit. Viner, Copyhold, C. e. Hale

MSS. Hargr. Co. Lit. 14 b. n. 5.

(b) That remainders and reversions of gavelkind lands are partible, see Dy. 128, pl. 58. 3 P. Williams, 63. Watk. Descents, 231.

( C. 56. )

MAYNE v. DIGLE.—In C. B.

Words, charging a criminal intent without any indictable act done in pursuance of it, are

THE plaintiff declared that there was a *colloquium circa ob-sessionem* and encompassing of Ed. Cooper's house, in order to the breaking of it open, and robbing it; and that the defendant did say of the plaintiff and another, "It was Thomas Mayne and J. Disne that were about to rob Ed. Cooper's

house." It was moved in arrest of judgment, that the words are not actionable, because they do intend but a design, and nothing acted. *Atkins*, Justice.—The words are actionable; for when they charge the plaintiff with something done, though the thing be not absolutely effected, this is more than a bare intention, and then they shall be actionable; as, "J. S. lay in wait at Shooter's Hill to rob me;" there the words are actionable, because there is more than a bare intention, (viz. a lying in wait): if the words had been spoken alone, they had not been actionable, because then they had denoted nothing but a bare intent; but here the words are pinned upon the *colloquium*, and by way of answer to it, and seem to imply something of action done, viz. the besieging and encompassing the house; and this case is stronger than my Lord *Lumley's*, cited in 4 Co. 16, where the words are, "My Lord Lumley hath gone about to take away my life;" there is nothing of action, unless going about shall be intended walking about, and so moving towards it. *Vide* Roll. 1 Part, 51, 52, Eighth case.

But by *Archer* and *Vaughan* (*Wylde absente*) Judgment was given for the defendant; and they relied upon *Eaton's* case, 4 Co. 16; and Cro. Eliz. 684. But they agreed, that if the words had implied any act done, they would have been actionable; as, to lie in wait to kill a man, although he doth \*not kill him; for there the lying in wait is indictable. Cro. Car. 140. If he had positively affirmed, that they had been of the number of those that besieged the house, it had been indictable; but upon the plaintiff's own shewing it was impossible to intend by the words that he was of the number of them, because he says it was *per quosdam malefactores adhuc ignotos*. Another reason was, because it is not averred that the house was besieged, or beset, and then it is impossible the plaintiff should be ever punished, by reason of those words. Yelv. 22. Hob. 6. And *per Vaughan*,—It is not enough that the words do charge him with any kind of action, as going with an intent to lie in wait; but it must be such a kind of action for which a man is indictable. *Jud' pro def' (a)*.

not actionable.  
T. Raym. 20:

[ \* 47 ]

(a) See *Harrison v. Stratton*, 4 Esp. Rep. 219. 1 Viner Ab. 438, 442. Com. Dig. Action for Defamation, F. 12. When a criminal intention coupled with an act is punishable by indictment, see *Sutton's* case, R. T. Hardw. 370. *Higgins's* case, 2 East, 5.

#### LADY BROOKE v. THOMLINSON.—In C. B.

( C. 57. )

THE plaintiff brought a writ of dower, to be indowed of the moiety of the manor of Cooling and several other lands of the nature of gavelkind in Kent. The defendant pleads the statute of 31 H. 8, c. 3, whereby these lands amongst others were disgavelled. The question was, Whether this collateral custom of indowing with a moiety be taken away by the sta-

The statute 31 Hen. 8, c. 3, for disgavelling certain lands in Kent, extends only to their partible quality, and not to the

custom of devising or endowing the widow with a moiety. Harg. Co. Lit. 140 b. n. (2). Rob. Gavelk. B. 1, C. 5, p. 75, 2d edit.

tute or no? *Broome pro querente, que nemy*, and that it shall alter nothing but the custom of descent, whereas it was partible *inter filios*, to make it descend to the eldest son; and that for these reasons,

1. The title meddles only with descent, and no other custom.

2. The first clause of the statute principally respects the descent; for the words are, "That they shall be clearly changed from the nature of gavelkind, and shall descend as lands at common law;" so that the words "clearly changed," &c. shall be intended clearly changed as to descent, by reason of the precedent and subsequent words, which interpret those, for statutes must not be construed by piecemeal.

3. Though the custom of descent be often mentioned, there is not one word in the statute that doth mention any other custom; neither is there one word of the statute that speaks of customs, but only of custom in the singular number.

[ \* 48 ]

\* 4. There are several beneficial customs, viz. 1. They are not forfeitable for murder or felony. 2. The husband shall be tenant by the curtesy without issue. 3. Devisable before the statute of 32 H. 8. 4. The wife shall be indowed of a moiety *quamdiu casta vixerit*. 5. Not forfeitable upon a *cessavit*. 6. An infant at fifteen may alien.

(1) *S.C. Hardr.* 325. 1 *Lev.* 79. *T. Raym.* 59, 76.

The essence of gavelkind is partibility; the other customs are collateral. Rob. Gavelk. B. 1, c. 1, p. 5, 6, 7, notes. But see *post*, C. 125.

And it cannot be intended, that those gentlemen that made suit for the statute should intend to have those beneficial customs taken away. And *Wylde, J.* cited a case adjudged Pasch. 15 Car, 2 (1), in the King's Bench between *Wiseman* and *Cotton*, where it was resolved, that the custom of devising was not taken away; and the reason there given by the Court was, because these collateral customs are not wrapped up in the gavelkind, but in the customs of Kent: and it was said, that these collateral customs are not essential to the gavelkind, but are collateral customs that are in those lands that are gavelkind; but it is gavelkind only as it is departible among heirs male. *Vide* 1 Inst. 140 a. And it was resolved *per Curiam*, that the statute extends only to alter the descent, and as for the other collateral customs leaves them as they were before. *Jud' pro quer'*, as to that point (a).

(a) *Post, Randall v. Richill*, C. 125, 428. Bac. Abr. Gavelkind, (B).

## DE TERM. S. MICH. 1672.

IN COMMUNI BANCO.

## EARL OF PEMBROKE v. STANIEL.

( C. 58. )

THE defendant said of the plaintiff, "The Earl of Pembroke is of so little esteem in the country, that no man of reputation hath any esteem for him; he is a pitiful fellow, and no man will take his word for two-pence; and no man of reputation values him more than I value the dirt under my feet." Resolved *per Cur'*, that the words are actionable upon the statute, though in the case of a common person they are not actionable. And it was said *per Twisden*,—That if words be spoke of a peer of the realm that are actionable in case of a common person, the peer hath his election to sue upon the statute, or otherwise. Sir *Francis North* cited the Marquis of *Dorchester's* case (1), where these words were resolved to be actionable upon the statute, viz. "He is no more to be valued than that dog that lies there."

Words are actionable in *Scand. Mag.* which would not be so in the case of a common person (a).

If words spoken of a peer would be actionable in the case of a common person, he may elect to sue on the stat. or otherwise.

(1) 1 Lev. 148. *Post*, p. 218.

(a) *Vid. post*, C. 225, 227, 229. Buller Scand. Mag. (B). 3 Wooddes Lect. Ni. Pri. p. 4. 3 Bl. Com. 123. Bac. Ab. 173-4.

## ANONYMUS.—In B. R.

( C. 59. )

*Samb. S. C.* 2 Lev. 72. 3 Kebl. 116. *Cock v. Cross*.

A. AND B, are obliged to C. A. dies, and makes D. his executor, who dies and makes C. his executor; C. sues B. for the debt. B. pleads the matter *supra*, and says, that *diversa bona et catalla* of A., the first testator, came to the hands of C. But it was ruled against B. because he did \* not say *ad valentiam debiti*, and perhaps the goods were but of the value of 6d.

The obligee [on a joint and several bond] who is executor of the executor of [ \* 50 ] one of the obligors, may sue the survivor, unless the deceased (a).

less it appear that he has received satisfaction out of the assets of

(a) See the other reports of this case referred to above, and Bac. Abr. Executors, (A) 9. 2 Show, 401. R. T. Hardw. 133.

## BEALE v. BALDWIN &amp; BROADWAY,—In C. B.

( C. 60. )

THE plaintiff brings a replevin against the defendants. One pleads *non cepit*; the other pleads, that it was his freehold. The plaintiff is nonsuit against one, and gets a verdict against the other. Resolved, that the nonsuit against one before judgment dischargeth both; and cited Hob. 70, 180 (a).

Where defendants plead separately in replevin, nonsuit against one before judgment discharges both.

(a) *Vid.* 1 Wms. Saund. 207 a. n. (2). Dougl. 169, n. 3 Term. Rep. 662.

## PALMER v. BRETHON.

( C. 61. )

TRESPASS *Quare clausum fregit*. The plaintiff (*inter alia*) declares for cutting down his hedges, and *fraxinos suas cepit*.

Trespass for entering

plaintiff's close and taking away "his ashes," without setting forth the number: held good after verdict.

Where the plaintiff may allege what number he pleases, the omission of number is matter of form only. *Dict. per Wild, J.*

Moved in arrest of judgment because he doth not set forth the number of ashes; and cited the 5 Co. 34. But the judges were of opinion, that it is but matter of form, and is helped after a verdict, *per* 18 Eliz. and the new statute, (notwithstanding the judgment of *Playter's* case, which they seemed to question in point of law). Judge *Wylde* gave this reason why it is but matter of form, because he might have alleged what number he pleased, and should recover so many as he proved; and they cited 2 Cro. 435, where, after deliberation, it was adjudged contrary to *Playter's* case. And whereas it was objected, that no attain would lie against the jury, by reason of this uncertainty; it was said, that an attain would lie against them well enough, if they gave excessive damages. And for the objection, that the defendant could not plead it in bar to another action for the same trees (*a*), it was said (by *Wylde*) that he might well enough, with an averment that they are the same. But it was agreed by the Court, that the party might have demurred before issue, and have shewed this for cause (*b*).

(*a*) *Vid.* 2 Ld. Raym. 1410. 4 Burr. 329. 2 Ventr. 174, 73. 1 Str. 637. Barn. 2455-6. Buller N. P. 84. 276. Buller, 84. 3 Wils. 292. 2 Bos. &

(*b*) *Post*, C. 532, 140. 1 Ventr. 53, 272, Pul. 265. 7 Taunt. 643.

## ( C. 62. )

### DANIEL & UX' v. STERLIN.

No action lies for calling a woman a whore, unless special

[ \* 51 ]

damage be alleged.

THE plaintiffs bring their action for these words spoken of the wife at four several times.

1. "Thou art a common whore, and thou wilt play the whore with any man for thy profit."

\* 2. "Thou art a whore, and playedst the part of a whore with J. S. and didst lie with him as with thine own husband."

3. He spoke the same words to a third person, viz. "She is a whore," &c.

4. "She is a common whore," &c. *ut supra*.

Resolved, that the action will not lie; but she ought to sue in the Spiritual Court; for this matter of scandal appertains to their conusance; for if the defendant would justify here, we cannot properly take conusance of the matter; though of late the course is, if special damages be alleged, the action will lie; but here is no allegation of special damages; and if the words were true, the crime doth not subject the party to any temporal punishment (*a*).

(*a*) *Ante*, C. 51. *Post*, C. 99, 302, 342. What special damage is sufficient, see *Moore v. Meagher*, 1 Taunt. 39.

## ( C. 62 b. )

When an award of all matters, up to a period not included in the submission, is good. *Post*, C. 632. 2 Mod. 309. Com. Dig. Arbitr. E. 2, 10.

PER Curium: If two parties do submit themselves for all matters in difference arising before the first of June; if the arbitrators make an award of all matters till the time of the award, which is in July, if no new matter arise after the first of June, it is good enough.



Also if the arbitrators award, that the parties shall give mutual releases, it is an award for both parties of both sides, and shall bind. In C. B. An award of mutual releases, good (a).

(a) *Post*, C. 160, 290, 450, 632. *Keen v. Goodwin*, Bunb. 250. 2 Wms. Saund. 293, n. (1).

BRUERTON *v.* RIGHT.—In C. B.

( C. 63. )

THE defendant justifies for common, from the carrying away of the corn till it was resowed with grain. The plaintiff replies, at the time of the trespass supposed, that it was sowed with turnips. The opinion of the Court was, that it was not such grain as was intended in the prescription.

Prescription for common, from the carrying away of corn till the land was resown with grain: held, that turnips are the prescription.  
not grain within

SHUTE *v.* HIGDON.—In C. B.

( C. 64. )

Continued from p. 27.

THIS Term the Lord Chief Justice *Vaughan* gave the opinion of the Court for the plaintiff. And whereas there were three questions made by the counsel, he set two of them quite out of the case, viz. 1st. Concerning the value; for he said, let the value be what it will, the patron, if he pleases, may present upon the taking of the second benefice; but no lapse should incur against him without notice, unless the first benefice were of the value of *8l. per annum*, and so within the statute; for then, the benefice being void by act of parliament, he is to take notice at his peril. 2d. The question concerning the reading of the articles, how it should relate, was not to the purpose; for the defendant, by the taking of the second benefice, had absolutely lost the first; so that the patron might present if he pleased: and he said, the difference is betwixt not subscribing the articles, and not reading of them; for if he had not subscribed, then he had never been legally instituted and inducted; and so had never had the second benefice, and then that would not have avoided the first; but here he was legally in possession; though by his neglect in not reading the articles he hath lost it again, and so is ousted of both; for he hath lost the first by taking the second, and hath forfeited the second by not reading the articles (e): and he said that in case of not reading the articles, lapse should have incurred against the patron, without

Upon acceptance of a second benefice with cure, the patron of the first benefice may present to it, be the value what it may (a). But lapse shall

[ \* 52. ] not incur against him without notice, unless the first benefice be of the value of *8l.* (b).

Acceptance of a second benefice, is void *ab initio* by not subscribing, and such acceptance therefore will not vacate the first (c).

Loss of the second benefice by not reading the articles does not restore the incumbent to the first which he had forfeited (d).

(a) *Com. Dig.* Esgliac, N. 5. 3 *Atk.* 455. 4 *Taunt.* 831. *Vaugh.* 131. *Post*, C. 253.

(b) 2 *Gibs.* *Cod.* 946, n. 1st ed. *F. N. B.* 83, n. 4to. edit. *Cro. Car.* 357. *Dy.* 237 a. 347 b. 4 *Co.* 75. *Post*, C. 253.

(c) *Vaugh.* 133. *Hob.* 168. 2 *Gibs.* *Cod.* 863, n.

(d) *Vaugh.* 133-4.

(e) The forfeiture of a living by not reading the articles is relaxed by 23 *Geo.* 2, c. 28, s. 2.

When a benefice is vacated by not reading, no lapse incurs against the patron without notice (f). Default in reading does not vacate the benefice *ab initio*.

notice, had not the statute made special provision for notice; and he seemed to incline, that not reading the articles should not make the benefice void *ab initio*; but the statute is, that admissions, institutions, and inductions, made contrary to the act, shall be void; now he that doth not subscribe is not instituted, &c. according to the act, and so it is void *ab initio*. *Jud' pro quer', per Cur' (g)*.

(f) Com. Dig. Esglise, H. 9. N. 11. Post, C. 253.

(g) Vid. Moor, 448. 2 Gibs. Cod. 945 n. 2 Wils. 174, 200.

( C. 65. )

LACY v. HARRIS.—In C. B.

The sheriff may execute an *Accedas ad curiam* by his bailiff, although the words of the writ require his personal attendance. The ministerial office of a sheriff may be exercised by deputy. Post, C. 445. 19 Viner, 423. Bac. Abr. Sheriff, (H) 3. 3 Kebl. 249. Noy, 107.

The execution [ \* 53 ] of writs often varies from the literal direction of them.

Hob. 3, in marg. 1 Whitel. King's Writ, p. 436.

Partition made by the under-sheriff.

AN *Accedas ad Curiam* was delivered by the sheriff's bailiffs; and Ford, the steward of Chafford hundred-court in Essex, refused to allow of it, because the sheriff did not come *in propria persona*, as it seems he should, by Cro. Eliz. 10. Fitz. Nat. Brev. 18. But the prothonotary informed the Court, that the constant practice is for the sheriff to send it by his bailiff. And they took a difference between a redisseisin and partition, &c. where the sheriff is judge, and this and other cases where his office is but ministerial. And Judge *Wylde* said, there may be great inconveniences if the sheriff must go in person; as if he should have several writs of *accedas ad Cur'* directed for several Courts at a great distance, kept the same day, it would be impossible for him to execute them: and whereas it was objected, that the words of the writ are *Quod accedat in propria persona*, &c. it was answered, that in many cases the execution of writs varies from the verbal direction of them; as, to chuse parliament-men, the writ is *Duo Milites*, &c. and yet good esquires do very well serve the turn; and so the writ of right is *24 Milites*, and yet other persons will serve; and so in this writ it is *assumptis tecum 4 militibus, mes ne besoigne estre Chivaliers*. Nat. Brev. 18. And the steward was ordered to take care that the party had restitution of his money taken upon the execution, or otherwise they would grant an attachment against him for disobeying the writ. And in my Lady *Winter's* case, in Trin. Term last, a partition was made by the under-sheriff; and because there could be no objection against the equality of it, the Court would not award a new writ (a).

(a) Vide Cro. El. 10. Lit. s. 248. Co. Lit. 171 a. Bac. Abr. Joint Tenants, (I) 7. The under-sheriff is enabled to make partition by 8 & 9 Will. 3, c. 31, s. 4.

( C. 66. )

LAYWORTHY v. CHICHESTER.—In C. B.

Declaration alleges a promise by defendant to pay, "if the plaintiff would make his debt appear," and

THE defendant was an administrator; and the plaintiff claiming a debt from the intestate, the defendant (upon a good consideration) did promise, if the plaintiff would make his debt appear, that he would pay him; and avers that he did make it appear. The defendant pleads *non assumptit*, and



found for the plaintiff; and moved in arrest of judgment, that the averment was insufficient, because he doth not say how he made it appear. But it was resolved to be good enough; because he must make it appear in the same action, or else the jury could not have found for him, and cited 2 Cro. 188. 10 Ed. 4, 11. And Serjeant *Baldwin* cited a case between *Bratt v. Prettiman*, in B. R. Trin. 17 Car. 2 (1), where the promise was to make it appear by oath, and he made affidavit before a Master of Chancery, and it was resolved to be good enough; because there was a set form limited, viz. by oath (b); but proof generally shall be intended by a jury, and making it appear, and proving are the same thing. *Jud' pro quer'.* Vide 2 Brownl. 57. Bulst. 3d Part, 56. Hob. 93. [2 Rol. 594. Latch, 96. 11 Co. 59. 1 Rol. 206.]

avers that plaintiff "did make it appear:" held good after verdict without shewing how. *Post*, C. 136.

(1) *Semb. S.C.* Sir T. Ray. 153.

A promise by defendant to pay, if the plaintiff "shall make his debt appear," or "prove it" generally, shall be intended of proof in an action (a).

(a) *Acc. post*, C. 136. *Wilson v. Dove*, and *Traverse v. Meres*, Sir T. Raym. 82. Com. Dig. *Assumpsit*, B. 4. Such a conditional promise will be evidence against the defendant in an action upon the original debt. *Semb. Hyleing v. Hastings*, 1 Ld. Raym. 389, 421.

(b) On the effect of an agreement to refer a dispute to the oath of the party, see further *Knight v. Rushworth*, Cro. El. 470. *Stevens v. Thacker*, Peake, 188. *Garnet v. Ball*, 3 Starkie, 160. *Post*, p. 133.

### LISTER v. KING.—In C. B.

( C. 67. )

THE plaintiff brings trespass. The defendant justifies, because that he, and those whose estate he hath in Black-acre time out of mind *habuerunt viam pedestrem et quoddam chimum ad fugand' et refugand'*, and doth not say *averia*. The plaintiff demurs. Serj. *Wilmot pro def'*.—That a bar shall be good to a common intent, and so *averia* shall \*be supplied by intendment; and cited 22 H. 6, 5. Bro. Count, 40. 11 H. 6, 5. 28 H. 6, 13. *Vaughan*, C. J.—If there could be no prescription but for all sorts of cattle, perhaps then it might be supplied by intendment that *averia* shall be intended; but it is possible the prescription might be for some particular cattle, as sheep, or swine: besides, here is no context, because here is no substantive; and it is so uncertain that no issue can be taken, and so it cannot possibly be helped. *Per Cur' Judgment pro Quer'*.

Defective statement of a right of way.

[ \* 54 ]

### HUBAND v. COOKE.

( C. 68. )

TROVER *pro centum ponderatis ænei, Anglice*, brass, and no *Anglice* for *ponderatis*; and judgment arrested, for the jury cannot tell what damages to give for *ponderatis*: and a case was cited in the King's Bench, where it was *pro duobus oneril lanæ, Anglice* horse-loads of wool, and good, because of the *Anglice*: and it was said that *ænei* here was an adjective; but *Vaughan* said, there might be *hoc æneum, ænei* of the neuter gender; and judgment *per Cur'* was arrested (a).

Bad Latin.

2 Roll. 247.

(a) *Vid. post*, C. 452, 567 b. 571, *Anglice*, see Gilb. C. P. 126, 127. 2 Hawk. 590, 594, 607. As to the use of an *An-* P. C. c. 25, s. 88.

( C. 69. ) NIGHTINGALE v. LEE. *Trin.* 24 Car. 2, *Rot.* 632.—In C. B.  
S. C. 3 Kebl. 171.

An executor is not bound at his peril to take notice of an original sued out against him in the county in which he is commorant; but express notice is necessary.

(1) S. C. Carter, 227.

[ \* 55 ]

ACTION of debt is brought against an executor, who pleads, that he had first notice of the action upon the 27th day of March, &c. and not before; *et quod ante eundem 27 diem Martii idem (scil. defend') plene administravit omnia bona et catala quæ fuerunt testatoris tempore mortis suæ, quæ ad manus suas devenerunt administrand'*; and the plaintiff demurs, because he doth not say that he was commorant in another county; for if he be commorant in the same county where the original was sued out, he is to take notice at his peril; and the plaintiff's counsel cited 2 H. 4, 21, and Bro. Assets, 4, where the defendant pleads that he was commorant in another county, and then sets forth that he had not notice *ante talem diem*, &c. And *Mellor & Overton's* case in this Court, Pasch. 19 Car. 2. *Rot.* 491 (1), was cited, where the defendant pleads as he doth here, and it was overruled for the plaintiff in the very point: but it was said on the other side, that it was unreasonable to make the executor take notice at his peril of an original, though it issue into the same \* county where he is resident, unless he were summoned by the sheriff, as he ought to be by the writ, or some way or other had notice. And *Vaughan*, Chief Justice, said, he had conferred with Judge *Hale*, and he said, that in the King's Bench they always used to have an express notice, or otherwise the party not to be charged for any thing administered after the *Præcipe*. And the counsel for the defendant said, the law had been formerly so taken, and cited *Scarle's* case, Moor, 37, 678. Bro. Notice, 16. 2 Ander. 159, 160. Fitz. Executor, 39. Plow. 279. *Wylde*, J.—He may refuse the executorship if he will; and if he take it, it must be *cum onere; et adjournatur; et puis Vaughan dit q' il ad confer ove les justices de B. R. et q' tous agree q' expresse notice est requisite coment q' le party soit commorant en mesne le county, et il dit al Serjeants prendre notice de ceo.* [Continued post, p. 110] (a).

(a) Acc. Com. Dig. Administration, C. 2. Wentw. Executors, c. 9, p. 146, edit. 1763. Cont. Shep. Touchst. 479.

( C. 70. )

HARTWELL v. COLE.

To say that A. "swore a false oath," is actionable with a *colloquium* concerning the proof of a will before the bishop.

1 Rol. Ab. 39. Cro. Jac. 436.

THE plaintiff declares, that there being a communication of the will of one C. and the proving thereof before the bishop, wherein the plaintiff was sworn, that the defendant spake these words of him: "In swearing what oath Hartwell hath sworn in that business, he did swear a false oath." It was objected that the bishop hath several Courts, as the Court of Audience, &c. which have not cognizance of wills; and then if he accuses him of swearing falsely where he could not swear judicially, the words will not be actionable. But it

was answered, that the bishop hath no Court of Audience, 4 Inst. 337. but the Arch-bishop only.

2. It was objected, the proving of wills is not before the bishop, but before the chancellor. It was answered, that the stile of the Court is in the bishop's name. And *Archer*, Justice, said, that the Bishop of Lincoln doth at this day oftentimes sit in Court with his chancellor. *Waller* moved in arrest of judgment, and cited *Yelv.* 72. 2 Co. 190, 436. *Hutton*, 44. *Win.* 2, 3. *Cro. Eliz.* 374. 375. But, *per Curiam*, the words are actionable, as the plaintiff hath declared setting out the communication. *Per Wylde* and *Vaughan*.—To say a man is forsworn in the King's Bench or Common Pleas, there being no *colloquium* of any cause there depending, the words are not actionable, for it may be in common discourse (a).

(a) *Ante*, C. 17. And see the cases collected in Com. Dig. Action for Defamation, D. 7, F. 18.

SMALLWOOD v. MARTIN.—In C. B.

[ 56 ]  
( C. 71. )

A WRIT of false judgment was brought to vacate a judgment given in the county court: The action was brought for 3*l*; and part of the record was, that *quia querens non replicavit ideo defendens dimissa est*. Serjeant *Turner* moved to set aside the judgment, 1. Because it held plea of above 40*s*. 2. Because here it doth not appear that any day was given to the plaintiff to reply. 3. Because he saith *defendens dimissa est*, and doth not say *eat sine die*; which *Wylde* said was a fatal exception; and for these causes the judgment was vacated.

Erroneous entry of judgment in the county court.

( C. 72. )

It was said for law, that money due by award may be attached (c); but if it be upon a judgment given in the Courts at Westminster, or if an action be commenced for a debt by the creditor in the King's Bench, or Common Pleas, it is not liable to a foreign attachment within the custom of the City of London. *Vide ante*, Case 4.

Money due by award may be attached. But not money due upon the judgment of a superior Court (a).

Nor a debt for which an action has been commenced in such a court (b).

(a) 1 Roll. Ab. 552. Cro. El. 63. Dyer, 247 a. marg.

(c) But not money awarded under a rule of Court. *Grant v. Hawding*, 4

(b) 1 Roll. Ab. 552. 1 Ld. Raym. Term Rep. 313, n. 727.

MEMORANDUM.—That upon Saturday, November 16th, the King sent for the Seal from the Lord Keeper, Sir *Orlando Bridgman*, and bestowed it upon the Earl of *Shaftsbury*, whom he made Lord Chancellor.

( C. 73. )

BOULS v. HORTON.

Continued from p. 31.

Whether the warranty of tenant in tail without assets, will rebut an heir from claiming the reversion? *Aff. Atkins and Wylde: Neg. Vaughan, C. J. and Archer.*

A feoffment is made with warranty to the use of the feoffor for life, remainder to the use of A.

[ \* 57 ]  
for life; remainder to the use of the right heirs of the feoffor: *quare*, whether A. can use this warranty by way of rebutter? *Aff. and Neg. ut supra.*

Warranty is a covenant real annexed to a freehold. If annexed to a chattel, it is but a personal covenant. Co. L. 365 a. 101 b. *Post*, C. 547.

Hob. 4.

THIS Term the Court were to give their opinions in this case, and it was argued by all the four judges: And *Wylde* and *Atkins* argued for the tenant; and they made two points in the case.

1. Lands being given to A. and the heirs of his body, the remainder to the donor and his heirs; the donor dies, and A. aliens with warranty and dies, and the warranty descends upon the heir of the donor; whether or no he be barred by this collateral warranty?

2. A feoffment is made with warranty to the use of the feoffor for life, the remainder to the use of J. S. for life, the remainder to the use of the right heirs of the feoffor; whether J. S. shall take advantage of this warranty so as to rebut?

\* For the first point *Atkins* held that the reversioner shall be barred by this collateral warranty; and he argued by these steps, 1. What a warranty is.

1. A warranty is a covenant real annexed to the land of an estate of freehold and inheritance; for if it be annexed to a chattel, it is a personal covenant; whereupon damages may be recovered.

2. The fruits of a warranty are either to rebut, or else to recover in recompence; and this recovery may be two ways, either by way of voucher, or else by a *Warrantia Chartæ* (a).

At the common law, all warranties, either lineal or collateral, did bind (without assets) the heir that they descended upon, unless it began by disseisin, Lit. sect. 697. The first law whereby they were restrained, was the statute of Glouc. and this barred only tenant by the courtesy; but all others stood as they did at the common law. 1 Inst. 365, sect. 725, and fol. 293.

Then came the statute *De donis*, which creates an estate tail, and restrains the alienation of it, or otherwise a warranty would have had the same effect upon this estate as it had upon all others at the common law. Warranties are not mentioned at all in this statute; and it is only by the construction of the judges that a lineal warranty shall not bar without assets, because the heir is within the words of the statute, viz. *Ille cui tenementum sic datum descendere debeat*.

This construction hath been received for law ever since the statute; and it is the opinion of Sir Ed. Coke, 1 Inst. 374 b. 2 Inst. 335 b. Fitz. Garrant. 16. The reasons that he gave were these:

1. The design of the statute *De donis* might at that time suit with the state of the kingdom, viz. to support the great

(a) See further on this threefold operation of a warranty. Gilb. Tenures, 134, &c. 2 Thomas's Co. Lit. 245, (n. A). 303, (n. G. 2).

families thereof, who, according to the Psalmist, thought their houses should abide for ever: and in Plow. 304, it is called the Amortizing of Lands.

2. Since the making of it, the inconveniencies being seen, many acts have been made to lessen the privileges it gives, as stat. 4 H. 7, 24. and 32 H. 8, 36, it is liable to be barred by a fine; by 26 H. 8. 17, it is made forfeitable for treason; by 33 H. 8, 39, it is liable to the king's debt. Hob. 257.

3. When any doubt doth arise upon a statute, it is best still to favour the common law; and at the common law all estates were bound by warranty.

\* 4. The tenant in tail might have bound the reversioner by a common recovery, and so it is no greater prejudice to him to be bound by collateral warranty. [ \* 58 ]

5. It is to favour a purchaser and a jointure, and so ought to have all the favour the law will allow it; and so concluded for the first point, that judgment ought to be given for the tenant.

*Ad secundam quæst'* he held, that the tenant in this case shall take advantage of this warranty by way of rebutter; because,

1. It is a covenant real annexed to the land itself, so that if the party had not come in in privity of estate, yet he may rebut. 5 Co. 18. 29 Ed. 3, 8.

2. The nature of a warranty is not to give a right, but to bind a right. Bro. Gar. 31. 35 Assi. pl. 9. 1 Inst. sect. 713. 3 H. 6, 11.

3. A stranger that is in possession shall take advantage by way of rebutter of a warranty made. 3 Co. 62. 1 Inst. 385 a. but he shall not vouch. Hob. 27.

1st. It is objected, that the warranty never vested in the feoffees; but *eodem instante* that the estate was in them by the feoffment, it was out by the statute.

*Ans.* It did vest, though the statute divested it immediately: for though (*per Wylde*) there is no priority of time in an instant, yet there is a priority of order and nature. Priority of time in an instant. *Post*, p. 251.

2d *Obj.* W. the ancestor that made the warranty was never bound, and consequently his heir shall not be bound.

*Ans.* At the first creation of the estate, while it was in the feoffees, he and his heirs were bound, although during his estate the warranty is suspended. Litt. sect. 744. Bro. Gar. 91. Cro. Car. 368.

*Wylde* held the same in both points: and he said, the whole question arises upon the statute *De donis*; for before that statute all estates, reversions, &c. were barred by warranty.

If the statute be taken according to the letter, it should not bar; but it shall not in this point, as it is not in others construed according to the letter; for it says, *ipse finis sit nullus*, and yet a fine was always a discontinuance; and *non habent potestatem alienandi*, and yet the tenant in tail had The statute *De donis* has not been construed literally. Co. Lit. 327 a.

always power to bar his issue, if he left assets (b); for the intent was, that he should not prejudice his issue by alienation.

[ \* 59 ] And the reason why a collateral warranty barred without assets was, upon a presumption that the ancestor would \* not prejudice his heir (c); and it is a presumption that the law will admit no presumption against, as it will not in other cases, viz. where the husband is *infra quatuor maria* (1); and *vide* Doct. and Stud. 123. 3 Ed. 3, 22, 23. 10 Ed. 3, 14. Cro. Car. 156. And he said, that it was this Term adjudged in the case of Sir *Peter Vanlore*, in the King's Bench, *per Hale, C. J. cæteris assentientibus, (et sic ego de aliis audivi)*.

(1) *Sed vid.*  
Hargr. Co. Lit.  
126 a. n. 2.  
8 East, 193.

*Cestui que use*  
may rebut, for  
he does not  
come in merely  
in the *post*, but  
by limitation of  
the party (d).  
3 Co. 62.

All warranties  
barred at com-  
mon law, except  
those which  
commenced by  
disseisin.  
Vaugh. 366.  
The stat. *De*  
*donis* was ex-  
pounded by re-  
ference to the  
stat. of Glouc.  
Vaugh. 365.  
3 Reeves's Hist.  
11.

Distinction of  
lineal and colla-  
teral warranty  
unknown at  
common law.  
Vaug. 366, 375.

Tenant in tail  
may bar a re-  
mainder by war-  
ranty without  
assets. Vaugh.  
367.

No remainder  
after a condi-

*Ad secundam quæst'* he said much what *Atkins* had said before; only he said, the party in this case doth not come in merely in the *post*, but by the limitation of the party; for if a feoffment be made to the use of one in tail, if tenant in tail bring his formedon he shall say *dedit*. And Judge *Wylde* put these cases in favour of rebutter. 35 Ass. pl. 9. 45 Ed. 3, 4. 38 Ed. 3, 12, 26. 46 Ed. 3, 4. 28 Ass. pl. 18. Roll. 776.

*Vaughan* and *Archer* argued in both points for the demandant.

*Ad primam quæst'*—They held, that the warranty of tenant in tail should not bar the donor or his heirs; they agreed, that all warranties barred at the common law, except such as commenced by disseisin; but that since the statute *De donis* it hath been always construed, that a lineal warranty shall not bind without assets. Lit. sect. 712. And the reason why it binds with assets might be from a retrospect that the expositors of the law made to the statute of Glouc', which restrains tenant by the curtesy unless he leaves assets; and so by construction this was transferred in equity to the statute *De donis*.

And *Vaughan* laid down these premises:

1. At the common law, the distinction of lineal and collateral warranty was utterly unknown, and never heard of till some considerable time after the statute *De donis*; and there was no more distinction between them than there is now between a paternal and a maternal, fraternal, &c. warranty.

2. The statute restrains not the tenant in tail from barring the remainder in tail, if his warranty descended upon him; and the reason is, not because it is a collateral warranty, but because that the remainder is none of the parties taken notice of to be prejudiced; neither indeed could it, for then there was no estate-tail; neither could there be any remain-

(b) If a warranty with assets had been held to be no bar to the issue, a circuitry of action would have resulted: for the issue would have recovered the estate tail from the alienee, and the alienee recovered in value against the issue. See Butl. Co. Lit. 373 b. n. 328.

(c) Co. Lit. 373 a. See reasons as-

signed in Gilb. Ten. 143-4. Wright's Ten. 168-9. The true reason is said by Ld. Holt to be the security of purchasers and the establishment of defective titles. 12 Mod. 512.

(d) *Post*, p. 188. Gilb. Ten. 136-8. Vaugh. 392. Salk. 685. 22 Viner, 165.



der upon a fee conditional, but the parties provided for by the statute are the issues in tail and the donor. dional fee. *Sed* *vid.* Vaugh. 269.

3. It doth not provide against mischiefs that were not at the making of the statute; and then there was no such \*remainder; and the statute forms a writ of formedon in reverter, but nothing of a formedon in remainder. [ \* 60 ]

4. The statute doth not intend to preserve estates-tail absolutely from alienations, but from the alienation of the donee; for the warranty of any other that descends upon the issue in tail shall bar him without assets; and so the warranty of the donee himself shall bar the remainder, but not the reversioner; because in this last case he is restrained by statute, in the other not. The warranty of an ancestor, not being the tenant in tail, will bar the issue without assets. *Ante*, p. 30. Vaugh. 369.

5. Whosoever saith, that the statute doth provide for the issue in tail, must likewise confess that it provides for the donor and his heirs; for in the same manner that it provides for one, it provides for the other.

Consequences deducible from these premises:

1. The tenant in tail is absolutely restrained from doing any act whereby the land may not descend, and consequently from aliening with warranty.

2. He is in the same manner restrained from doing any act whereby the lands may not revert to the donor; for it will be absurd to affirm the one and deny the other, because there is the same provision for both; if the words had been, "that they should not alien with warranty, *quo minus*, &c." it had been clear.

3. Although the word "warranty" is not in the statute, yet it is necessarily implied, for otherwise the warranty of tenant in tail would bar the issue without assets; and if it be implied in one case, there is the same reason to imply it in the other; for the distinction of lineal and collateral is a thing subsequent to the statute, and therefore could not be intended by the statute: suppose the statute had separately provided for the donor and his issue, would any body have questioned, but then they had been within the provision of the statute? Why then, it is not possible to imagine, that the coupling the issue of the donee in the same security should nullify it as to the donor and his heirs. Warranties are not expressly restrained by stat. *De donis*, but impliedly. Vaugh. 372. 12 Mod. 512.

*Obj.* It was a common mischief for the warranty of the donee to descend upon his issue, but it was rare for it to fall upon the donor; and the statute shall be intended to provide against common evils only. Of the maxim "*ad ea quæ frequentius accidunt, jura adaptantur.*" Vaugh. 371, 373. *Vid.* Hutton, 109. Wingate's Max. 716.

*Ans.* If it had not been within the express words of the statute, that might have been a reason why it should not have been included by construction, but that is no reason, when it is expressed, why it should be excluded. That which \*might introduce this error might be the misunderstanding of the text of Littleton, sect. 712, where he says, that a collateral warranty shall be a bar to him that demandeth fee-simple or fee-tail, except in cases that are restrained [ \* 61 ]



Vaugh. 375-7. by the statutes; where, if they had observed, that it is said "statutes," in the plural number, they could not so easily have erred; for there were then no statutes that restrained warranties but the statute of Glouc' and this statute *De donis*; and this must therefore restrain some collateral warranty, and it restrains no other but this only.

Vaugh. 377-8. *2d Obj.* Fitz. Gar. pl. 16. It is said there, that it was *Herle's* opinion, that the donor estranger should not be barred, but he that is of the blood should.

*Ans.* That is to say nothing; for he that is not of the blood can never be barred, if there were no statute, for the warranty can never descend upon him; and some donor is certainly remedied, that before might have been prejudiced, and that must be he that was of the blood; and one of the parties expressly provided for is the donor in frank-marriage, and he must necessarily be of blood to one of the donees. Cases objected, Fitz. Gar. pl. 44, 61. 4 Ed. 3, 53.

*3d Obj.* is from the case in Moor, 96. *Evans* his case in the very point. 2 Inst. 335.

*Ans.* That case is not reported by Sir Fra. Moor, but to Sir Fra. Moor.

2. It is no judicial opinion (e).

And as for the case of *Salvin* and *Clerke*, in the 3 Croke, that case is resolved upon the point of non-claim, and not upon the point of collateral warranty, for it was out of the case.

Tenant cannot rebut by reason of possession alone, but must convey the warranty to himself. Vaugh. 385-6-7. Per Vaughan, C. J.

*Ad secundam quæst'.*—He held, that the tenant could not rebut only by reason of her possession; and as for the opinion in *Lincoln College's* case, (3 Co. 62,) and 1 Inst. 385, he said, if it be meant only that the tenant may rebut, let the quantity of his estate be what it will, he doth agree to it, but the tenant shall never rebut, unless he can convey the warranty to himself. Fitz. Gar. 48. 22 Ass. pl. 88. The tenant that rebutteth setteth forth how the warranty extends to him, but he need not shew what estate he hath. 6 Ed. 3, 6. 10 Ed. 3, 42. 15 Ed. 3, 18. The form of pleading a rebutter concludes, that if he were impleaded by a stranger, he ought to warrant it to him; and whereas Sir Ed. Coke says, that if a warranty be made to a man and his heirs, that the assignee shall rebut, and cites 38 Ed. 3, 21, the case warrants no such thing; for it is, if land be warranted to \*a man, his heirs and assigns; the assignee of the heir, or the assignee of the assignee shall rebut. 7 Ed. 3, 34. 47 Ed. 3, 44. 45 Ed. 3, 18. In all these cases the party that rebuts shews how the warranty extends to him: Besides, the warranty here is clearly gone, for when the warrantor takes back an estate for life, the remainder to his right heirs, the warranty remains in no person at all; besides, she cannot derive this warranty to herself, for, if she doth any way, it

Co. Lit. 385 a. Post, p. 188. Vaugh. 388.

[ . \* 62 ]

Vaugh. 389, 390.

(e) On the authority of extra-judicial opinions, see Vaugh. 382-3.

must be as assignee; and that she cannot do, because it is made only to the feoffees and their heirs; and he said, the warranty doth vest in the feoffees, contrary to the opinion of Jones and Croke (in *Spirit* and *Bence's* case, 3 Croke,) but when the estate is executed in the feoffee and his heirs, by the statute, the warranty is gone. And so he and *Archer* gave their opinions for the demandant.

And they held, that the warranty of the donee would bar the remainder, but not the reversioner; because one is provided for by the statute, and the other not: And they likewise held, that the warranty of any other person, besides the donee, descending upon the reversioner, would bar him, because he is only secured by the statute against the donee (*f*).

The warranty of any person but the donee, descending upon the reversioner, will bar him. (*Semb.* without assets.) Rast. Entr. Formedon, pl. 4. Latch, 67.

(*f*) The judgment of C. J. Vaughan is given at great length in his reports. See also Butler's note to Co. Lit. 373 b. where the annotator seems to think that a particular estate in remainder, being carved out, and part, of the reversion, might perhaps be held to be equally entitled to the protection of the stat. *De donis*, and therefore not to be barred by the war-

ranty of the tenant in tail without assets. The opinion of C. J. Vaughan in the above case is generally considered to be law. See 4 Cruise's Digest, 444, 2d edit. By 4 Ann. c. 16, collateral warranties made by any ancestor, who has no estate of inheritance in possession in the lands warranted, are void against the heir.

### CHALLIS v. HILL.—In C. B.

( C. 74. )

TRESPASS for breaking his house. The defendant justifies, that he was a bailiff, &c. and that he had a warrant from the sheriff upon a writ *de excommunicato capiendo*; and that he did enter his house, *et virtute captionis et arrestationis prædict' ipsum sub custodia habuit, et quod seipsum rescussit*, &c., and doth not say, that he did take or arrest him; and so *prædict'* makes it naught.

### GILL v. RUSSELLS, Father and Son.

( C. 75. )

DEBT upon a bond to perform an award.

See post, p. 139.

The son pleads *Deins age*. The father pleads, *Nullum fecerunt arbitrium*.

The plaintiff replies, that there was an award, that Russell, the father and the son, or one of them, should pay unto Gill 9*l*., and that they should both give him a general release; and that afterwards Gill should release to the defendants.

\* Russell, the father, replies, that his son was within age, [ \* 63 ] when the release, &c. was to be made; and the plaintiff demurs.

*Ellis pro quer'*. — Admitting that it is voidable by the infant, it shall bind the other. 22 Ed. 4, 25. Roll. 244, pl. 19. If an award be, that the obligor and a stranger shall pay 10*l*., though it be void as to the stranger, yet the obligor shall pay the money. 10 Co. 131. A submission by an infant, Post, C. 160.

Post, C. 160.

with a penal bond, the bond is void. Latch. 207. 13 H. 4, 12. 10 H. 6, 14.

A submission, bond and award binding an infant and another, may be voidable as to the infant, and valid as to the other, if the act to be done by the latter be distinct. Per Vaughan.

*Baldwin pro def.*—And he said the award is void, for that it is but of one side, for all that is to be done by the plaintiff is to release, and that is not till after a release made to him by the defendants, and one of the defendants being within age, that cannot be done, and so in effect the plaintiff is to do nothing. *Vaughan.*—The submission, bond and award, may be all voidable as to the infant; and yet the other parties may be bound; as if an infant and another seal a bond of 100*l.*, the infant may avoid it, but the other must pay the money; and the difference is, if the act to be done by the other party be distinct, and may be done without the infant, there he shall be bound: but if the act be to be done jointly between them, it is otherwise; and the release of the infant being that which he may at his pleasure avoid, it seems to be all one as if he were out of the case. *Sed Curia advisare vult.* [Continued post, p. 139.]

( C. 76. )

COLLSHERD v. JACKSON.

*Sembl.* Custom in an inferior court to take the bail, upon default made by the principal, without a previous *scire facias*, is good. *Quære*, if a custom to take the bail without a previous *capias* against the principal, be good? (a).

THE plaintiff declares of imprisoning him, and detaining him till he paid 42*l.*

The defendant justifies, for that the city of Carlisle is an antient city, and that there is a Court held before the mayor, &c., and that there is a custom, that if any person be sued in an action of covenant, and any other person be bail, that if the principal do not pay the damages that are recovered against him, &c. that the bailiffs have used to take the bodies of such bail, &c., and shews that an action of covenant was brought against J. S.; and that a recovery of 39*l.* in damages was had against him, and that the plaintiff was bail; and thereupon a *capias* was sued out against the principal, and returned *Non est inventus*; and thereupon a *capias* was sued out against the bail, by virtue whereof he arrested him. The plaintiff demurs.

[ \* 64 ]

\* *Nudigate pro quer* objected,—It is said the custom is, if the principal do not pay the money, they may take the bail, and does not mention any *sci. fa.* to be sued out against him. It was answered *per Wylde*, —That a custom to take the bail without a *sci. fa.* hath been adjudged good, but not without a *Non est inventus* returned against the principal. *Vaughan.*—If an act of parliament were made, that, if the principal do not pay the money, the bail should be taken without any *capias* sued forth against the principal, no man would doubt but it were good: every custom supposes a law, and if it be not irrational, and entertains no contradictions, it is good.

Every custom supposes a law, and, if not irrational or contradictory, is good. Per Vaughan, C. J.

2. It was objected, that he doth not say when the Court is to be held; and the *capias* ought to be returned at a day

(a) *Cont. Cro. El.* 185. *Bacon Abr. Customs*, (C).

certain. 2 Cro. 314. Roll 2. Part, 560. *Turner*, Serjeant.— *Vid. ante*, p. 37. *Post*, p. 317, 320. Though it be not said when it is to be kept, by naming the day, yet it is laid to be *secundum consuetudinem*. 7 Viner, 118.

The last objection was made by *Wylde*, viz.—The plaintiff declares for detaining him till he paid 42*l.*; and he justifies by virtue of a recovery of 39*l.*, and says nothing for the residue; and this was looked upon as a fault incurable. *Sed adjournatur* (b). 1 Ld. Ray. 405.

(b) *Acc. Harding v. Ferne*, 2 Mod. 177. Yet the gist of the action is the imprisonment, and the sum extorted is only matter of aggravation which it is not necessary to answer in the plea, *Swinstead v. Lyddal*, 1 Salk. 408. Com. Dig. Pleader, E. 1. *Taylor v. Cole*, 3

Term Rep. 292. 1 H. Black. 555. If the defendant in fact detained the plaintiff for a larger sum than was justly due, this is matter of replication or new assignment. *Swinstead v. Lyddal*, *supra*. *Monprivatt v. Smith*, 2 Camp. 175, and note *ib.* 176.

— v. CARTER.—In C. B.

( C. 77. )

DEBT was brought upon the statute of 5 Eliz. for exercising the trade of a grocer, not being an apprentice, &c. After a verdict for the plaintiff, it was moved in arrest of judgment, that this action ought not by stat. 21 Jac. and 31 Eliz. cap. 5. to have been brought out of the proper county: and *Scrogs pro quer'* said,—That such actions as can be commenced before justices of Nisi Prius, of the peace, &c. ought to be brought there, and not elsewhere; but he said, an action of debt cannot be commenced before them, and therefore it might be brought in any of the Courts at Westminster; and as for the statute of 31 Eliz. (which enacts that all actions upon 5 Eliz. concerning trades, &c. shall be prosecuted at the assizes or sessions of the county) he said there had been several resolutions subsequent to that statute, where it was resolved, that an action or information in any of these Courts was good: And he cited 2 Cro. 179, 538. 6 Co. fol. 19: and he cited a case of *Barnes v. Hughes* in B. R. (1), Hil. 21 Car. 2. Rot. 770, where it was expressly, in an action of debt upon this statute of 5 Eliz. resolved, that it was well brought in that Court, because an action of debt would not lie in any of those inferior Courts of sessions; &c. and the difference was taken between an information and an action of debt; for any suit that may be brought there cannot be brought here; as an information, &c. And Serjt. *Baldwin*, who was of counsel for the defendant, confessed that case, and said he was of counsel in it; but he said, whilst *Windham* lived, and sat in that Court, he was of a contrary judgment, and the judgment was given soon after his death; and he cited a case, Hil. 23 Car. 1, between *Taylor & Ash* (2): And Mr. Justice *Wylde* said he was of counsel in it, where it was expressly adjudged to the contrary; and *Wylde* said, if this would serve the turn, the statute would be evaded, which was intended for the quiet of the common people; for it will be no more but to bring an action of debt, instead of

Whether debt lies in the Courts at Westminster for using a trade without having served an apprenticeship, the offence being committed out of Middlesex? *Post*, p. 377, 483, 534. 1 Viner, 203. 1 Salk. 373.

(1) S. C. 1 Lev. 249. 1 Ventr.

\* 65 [ 8. 1 Sid. 400.

(2) *Quære*, *Naylor v. Ash*, Styl. 223?

An information on a penal statute exhibited in the proper county, may be removed by *certiorari*. 1 Jon. 193. 2 Hawk. B. 2, c. 26, § 37.

an information, and you may fetch the party from the most remote parts of the nation; whereas the statute intended they should not be compelled out of the county. But *Vaughan* said, —If the party may not have his action of debt here, the statute will, by construction, absolutely take away the action of debt. *Wylde*. —If an information be exhibited in the proper county, and the defendant bring a *certiorari*, it may be prosecuted here, notwithstanding the statute says no suit shall be commenced or prosecuted; but the reason of that is, because the statute is made for the ease of the defendant; and if he will dispense with the privilege the statute gives him, he may well do it. *Scroggs* said, the plaintiff may bring his *certiorari*, if he please; for in the *certiorari* it doth not appear who brings it. *Wylde*. —If it be brought by the plaintiff, the Court will grant a *Procedendo*. *Curia advisare vult* (a).

(a) It is settled that the stat. 21 Jac. 1, restrains actions upon the stat. 5 Eliz. from being brought in the Courts at Westminster, unless for offences arising in Middlesex, where those Courts sit. See the cases collected in the notes to

*R. v. Kilderby*, 1 Saund. 312 a. Hawk. P. C. B. 2, c. 26, § 34. The stat. of Eliz. is repealed by 54 Geo. 3, c. 96, as far as regards the exercise of a trade without having served as an apprentice.

( C. 78. )

BURRELL v. STRONG.—In C. B.

Whether an action lies for the breach of a contract to marry?

*Post*, p. 95, 347, 541.

[ \* 66 ]

IN consideration the plaintiff had promised to marry the defendant *quando esset requisita*, and would meet him at the house of J. H. such a day, he would marry her; and avers that she was and *adhuc libens existit*, and went to the house of J. H. at the day; and that the defendant did then, and doth still refuse to marry her. A verdict was given for the plaintiff; upon Not Guilty pleaded, and 50*l.* damages, moved in arrest of judgment, because this is no good consideration; for the going to the house of J. H. cannot be \* the consideration intended, for then the jury would be liable to an attain for giving such damages; but the principal thing was her promise to marry him; and because that is an act that cannot be done but at the same time the defendant performs his part that he promised, *Vaughan* consented, that it was no good consideration; and he said these actions were never heard of till the late times (1), when the jurisdiction of the Spiritual Court was out of doors; and then they extended the jurisdiction of the common law to the consance of those things that did properly belong to that Court, viz. they did sue for legacies at the common law (2), and several other things. *Wylde*. —The office of the Spiritual Court is only to consummate that marriage that is initiated by the contract, and to force the parties to it, but there are no damages recoverable (a). And it is as when a man covenants to convey

(1) *Post*, p. 96. Bridgman's Judgments, (by Bannister) p. 251.

(2) *Sty.* 55. *T. Ray.* 24. 5 *Term Rep.* 692.

(a) The remedy in the Spiritual Court was held to be released by a recovery in a Court of law; and a sentence in the former Court, disaffirming the pre-

contract, was admitted as evidence to defeat the action of the plaintiff in the latter, *Jesson v. Collis*, 2 *Salk.* 437. *S. C.* 6 *Mod.* 155.



land to me, I can either sue him in Chancery to force him to convey, or at the common law to recover damages for his non-performance. *Archer*.—It was adjudged here in a Hertfordshire case, that in consideration you will forbear to marry for seven years, I will marry you, that that was a consideration, because perhaps she lost her preferment by her forbearance; *quod Curia concessit*. It was said, that it hath been oftentimes adjudged in the King's Bench, that this consideration is good, if it were no more than, "If you will marry me, I will marry you:" And they cited Style 295, 303, 304. *Vaughan*.—If the judgments have run so in the King's Bench, we will not differ from them; for if we give judgments here to the contrary, they will reverse them there. *Curia advisare vult* (b).

A promise by defendant to marry plaintiff, in consideration that plaintiff would forbear to marry for seven years: held a good consideration. *Per Wild, J.*

(b) See the Case of *Holder v. Dickeson*, post, p. 95.

### ANONYMUS.—In C. B.

( C. 79. )

A. PROMISES, that in consideration B. would forbear to sue C. that he would pay him. Moved in arrest of judgment, that here is no good consideration; because he doth not say how long he should forbear him. *Wylde*.—It hath been oftentimes adjudged, that where it is to forbear, and no time mentioned, it must be intended during his life. Judgment *pro quer' per Curiam*. Hug. Abr. 58. Sty. 420 (a).

Promise in consideration that plaintiff would forbear to sue, &c. shall be intended a forbearance for life. Lat. 151. 1 Roll. 22, 27.

(a) Cro. Jac. 397, 683. Hob. 219. Post, C. 595. But the plaintiff "needs not tarry all his life" before he sues the defendant: it is sufficient if it appears by averment, or by collection from the record, that he forbore for a convenient or reasonable time before he commenced the action.

Cro. Jac. 683-4. *Barnhurst v. Cabbot*, Hardr. 5. *Edwards v. Roberts*, 2 Mod. 24. It seems even to be enough to aver that he did forbear generally, without more. *Edwards v. Roberts*, supra. Com. Dig. Pleader, C. 61.

### THE LADY STUKELY'S CASE.—In C. B.

[ 67 ]

( C. 80. )

SHE brought her action for these words spoke of her, "She was guilty of sacrilege." It was moved in arrest of judgment, that the words were not actionable. It was said for the plaintiff, that the words shall be taken *secundum excellentiam*, and shall not be intended of withdrawing of tithes, &c. as, "Thou hast forged a privy seal," shall be intended the king's privy seal, and no private person's. 1 Roll. 68. But the case chiefly relied upon (by *Ellis* of counsel with the plaintiff) was Dr. *Sibthorp's* case, Cro. Car. 417, where the words are, "Dr. *Sibthorp* hath robbed the church;" and adjudged actionable: but, *per Curiam*, this case differs from that, for robbing the church must be intended a felonious taking of the goods of the church, and is an English word, and in that sense commonly understood: But sacrilege is by the Civilians defined to be any *illicita contrectatio rei ecclesiæ*, and is oftentimes extended to the detaining of tithes, or the purchasing

Words charging the plaintiff with *sacrilege* held not actionable.

of bishop's lands, &c. where any kind of injury is done to the church. *Per Curiam*, the words are not actionable (a).

(a) *Acc. Gaudy v. Smith*, 1 Lev. 250. 1 Sid. 376.

( C. 81. )

LORD BYRON'S CASE.—In C. B.

In a suit for tithes in the Spiritual Court, the parishioners pleaded that the tithes were settled on another person by act of parliament. The Court was prohibited for refusing to allow the plea.

2 Ld. Raym. 1211. *Post*, C. 92.  
1 Rol. 83.

THE Lord Byron sued for tithes in the Spiritual Court; and the parishioners pleaded that there was an act of parliament that settled these tithes upon Sir William Juxon; and the Spiritual Court refusing to allow this plea, *Baldwin* moved for a prohibition; and said, where the parishioners did plead to the parson's title in the Spiritual Court, and they refused to allow of it, that it was usual to grant a prohibition, and cited a case where a parson sued for tithes, and the parishioners pleaded that he had not read the articles within two months, *secundum* stat. 13 Eliz. and the Spiritual Court refusing to allow of this plea, this Court granted a prohibition. *Vaughan* at first opposed it, because he said, if the party set forth his tithes, it did not concern him who had the interest in them, for he had no more to do. *Atkins*.—But what shall he do, if he hath not set them forth? and after debate, the Court ordered a prohibition *nisi* (a).

(a) *S. C.* but not *S. P.* reported. 2 Lev. 64, in B. R.

[ 68 ]

( C. 82. )

WALKER'S CASE.

Spiritual Court prohibited *quoad* the examination of the paternity of a bastard, but allowed to proceed *quoad* acts of fornication.

2 Wils. 79.  
*Post*, C. 325.

WALKER was sued in the Spiritual Court for fornication; and the libel was *quod sæpe et iteratis vicibus cum prædictæ Maria crimen fornicationis commisit et carnaliter cognovit, per quod ipsa devenit gravida et prolem edidit fæmineam*. *Walker* prayed a prohibition, and suggested the stat. of 8 Eliz. that impowers the justices of peace concerning bastard children; and sets forth that one J. S. was adjudged the reputed father by the justices, &c. according to the statute; and that now in the Spiritual Court they would go to impeach that judgment, and cited 2 Cro. 535, 625. But the Court were of opinion, that as to their examination of the paternity, a prohibition should go; but as to those iterated acts of fornication that he was charged withal, they might proceed, for it was properly in their conusance.

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DE TERM. S. HILARII, 1672.

IN COMMUNI BANCO.

( C. 83. ) THE LADY ESSEX, RICH, v. KEY'S [CAIUS] COL. IN CAMBRIDGE.

An original in *quare impedit* not amendable as to the name of the defendant.

THE plaintiff brought a *quare impedit* against the defendants, who had presented to the church of ———, and mistaking the name of the corporation prayed an amendment;



because the six months being elapsed, they could not bring a new writ without the loss of this presentation; and cited Cro. Eliz. 119. *Rookesby's* case, where *ad* was omitted, and Hob. 118, where *vaccaria* was put for *vicaria*, and both suffered to be amended: but *per Cur.* before the statute of 14 Ed. 3, there could be no amendments (*a*); and both the cases cited come within the letter of that statute, which gives liberty to amend upon the mistake of a letter or syllable, and there is no precedent of any other amendment since, but where it is *vitium clerici*; but here it appears clearly, that it was the fault of the party, and not of the clerk. And *per Vaughan*, if we may amend a word, we may amend twenty, and so in effect make a new original: and cited a case adjudged in this Court the last Term, where *ecclesia* was mistaken for *vicaria*, and the Court would not suffer it to be amended (*b*).

(*a*) A trifling misprision in the writ was amendable at common law in the case of the King. 8 Co. 156 b. Gilb.

C. P. 109.

(*b*) *Sed vid.* Cro. Car. 74. 1 Lev. 2.

1 Lev. 2.

1 Mod. 15.

[ 70 ]

( C. 84. )

PIERSON *v.* ATKINSON.—In C. B.

THE plaintiff being parson of Staunton in Durham, and having a dispensation for two benefices, agreed with the defendant for 22*l.* to serve the cure of Staunton. The defendant made his application to the bishop to enlarge his stipend; the bishop ordered that he should allow him 32*l.* *per ann.* The plaintiff paid him his 22*l.* according to agreement; and he libelled against the plaintiff for the addition by the bishop in the Spiritual Court, and the plaintiff prayed a prohibition. The defendant's counsel insisted upon it, that this being an allowance by order of the bishop, was properly suable in the Ecclesiastical Court, and cited Cro. Eliz. 675. Nat. Br. 51. 4 Inst. 491, but the Court granted a prohibition; for there being a contract between the parties, the bishop had no power to make any order; but if so be that the curate had served the cure, and made no agreement, then the bishop might have allowed him what he thought reasonable, in the nature of a *quantum meruit*; and a prohibition was granted.

The Spiritual Court prohibited from enforcing payment of a stipend to the curate enlarged by the bishop's order, when there was a contract between the parties. *Vid.* 57 Geo. 3, c. 99.

THE KING *v.* FOSTER.—In Cancellaria.

( C. 85. )

KING Charles I. by his letters patent granted to one Perin the office of under-searcher, &c. *durante beneplacito nostro*; and since this king was restored, he sends his privy signet to the Lord Treasurer, to confirm this Perin in his place. Foster obtains a patent from this king of this place, without taking notice of the former patent to Perin. The sole question was, whether this second patent was void, *per Stat.* 6 H. 8, cap. 15.

*Winnington pro def.* argued that it was not: he admitted

*Semb.* The office of under-searcher granted "*durante beneplacito*," determines upon the king's demise. Com. Dig. Officer, K. 10. The king's privy signet transfers no interest.

4 Inst. 88.

1 Bl. Com. 249.

[ \* 71 ]

(1) But see  
12 & 13 Will. 3,  
c. 2. 1 Geo. 3,  
c. 23.(2) 1 Hawk.  
c. 60, § 17.Dyer, 270. 10  
Ed. 4, 18.See this point  
discussed in  
*Thomas v. Sor-*  
*rell*, *post*, p.  
85, *et seq.*

that if this second patent had been granted in the life of the first king, without taking notice of the first patent, it had been clearly void; but here he held, that the first patent was absolutely determined by the death of the king: and here he distinguished between the king's politic capacity and his natural capacity; the king's politic capacity never dies, and so there can be no *interregnum*, as Dyer, 165: but his natural capacity may die, and then those things which depend upon it die also; as his reason, and will, and pleasure, for these are the proceeds of his natural \* capacity and person, and die with it. All judges' commissions determine upon the death of the king (1), 7 Co. 10. 1 Ed. 5, 5; because there is a personal confidence that the king hath in them: if a man give security to keep the king's peace, if the king die he must give a new security (2). 1 H. 7, 1. If the grant were during the king's life, it would certainly determine by his death, and then a grant during his will shall not be of longer continuance. 12 Co. 49. 1 Inst. 59. 5 Ed. 4, 8. 5 Ed. 4, 2.

*North pro def.*—The grant doth not determine by his death; and cited 12 Co. 49, if a lease be made *durante beneplacito*, it doth not determine by his death; and took a difference between judicial offices and matters of interest, or ministerial offices, as this is; for in judicial offices, if the grant be never so absolute, it determines by his death; but not so in other things; and this was for the king's advantage, that this should not determine; for the king hath his election here to turn him out; and it is not convenient there should be a vacancy in those petty offices; and cited Moor, 176. 2 Inst. 742. Dyer, 94. But it was agreed on all hands, that the king's privy signet did but intimate the king's mind, but could transfer no interest. But the Lord Chancellor *Windham* and *Rainsford* inclined, that the patent was determined, and the *Sci. fa.* to be quashed, without better cause shewn (a).

(a) As to the determination of offices by the king's death, see 7 & 8 Will. 3, c. 27. 1 Ann. c. 8. 4 Ann. c. 8. 6 Ann. c. 7.

( C. 86. ) *PIERSON v. HUGHES.*—In C. B. *Intratur Mich.* 24 Car 2. *Rot.* 365.

S. C. 3 Kebl. 140, 153. Carter, 229.

See margin,  
*post*, p. 81.

DEBT upon an obligation. The condition was, If the defendant did pay all monies that the plaintiff had expended in a suit between A. and B. wherein he was attorney, and all that he should expend in the prosecution of the said suit, that then, &c. To this the defendant demurs generally.

*Broome pro def.* said, that the bond was void, for the condition was against law, being for maintenance: And that this is maintenance appears by 1 Inst. 368 b, where one maintaineth the one side, without having any part of the thing, it is maintenance; and there is no difference between paying money towards it, and giving bond to pay it; and cited 42 Ed. 3, 6 b. Bro. Obligation, 11, a case in point.

*Post*, p. 81.

*Turner pro quer'* argued, that the bond is good; for it is lawful for an attorney to lay out money for his master, and he to pay him again, 2 Inst. 564; and, if so, then he may take his promise, or his bond for it; to which the Court assented, 2 Cro. 520, 521. Hob. 67, 117. Where there is a certain sum promised, perhaps it may be unlawful; but if it be for his due fees it is otherwise. Style, 184. *Per Rolle.*— That which an attorney doth for his client is maintenance, but it is lawful maintenance. But here it is objected, that the obligors are strangers to the suit. *Ans.* If the party be a poor man, and the attorney will not trust him, certainly he may get his friends to be engaged with him for the money he shall lay out; but however it cannot be denied but part of the condition, viz. to pay what he had already laid out, is good enough; and then part being good, and part void, it shall not be void for all, unless it were where a bond is made void by statute; and that difference is taken. Hob. 14. The Court did incline to think that it was maintenance in the strangers; for else they said, the statutes of maintenance would be easily eluded, and people might maintain very securely, by giving bond; which would be altogether as great an evil as laying out money; and they the rather inclined to it in this case, because here the party to the suit was not bound with them, but they were three strangers.

*Mainard ut amicus Curiae dixit*, that it had been adjudged maintenance, for a man to speak to a counsel (1), or an attorney to encourage the suit wherein he had no interest: and that the master might maintain for the servant, but not the servant for the master (2). *Sed Curia advisare vult.* [Continued, *post*, p. 81.]

5 H. 7, 20 b.

*Post*, p. 82.

15 Viner, 166.

*Post*, C. 101, note (a).(1) 1 Hawk. c 83, § 5, 6, 7.  
(2) *Ibid.* § 23, 24. 15 Viner, 163-4.

## STONE v. PEACOCK.

( C. 87. )

THE plaintiff suggested, that time out of mind he had had all the tares, &c. that he sowed and cut green, to give to his horses, tithe-free. And a prohibition was granted *nisi* (a).

*Semble*, a prescription to have all tares, cut green to give horses, tithe free, is good.(a) *Perry v. Soam*, Cro. El. 139. Com. Dig. Dismes, E. 11.

## HILL &amp; UXOR v. GOOD.

[ 73 ]

S. C. 3 Kebl. 166. Vaugh. 302.

( C. 88. )

THE plaintiff was sued in the Spiritual Court for marrying his wife's sister. In *Parson's* case (a) a prohibition was granted, but there it was a degree more remote, for there the party married his wife's sister's daughter. *Atkins* — *Levit.* xviii. v. 18, doth not come to this, for that is meant, in the life of the wife (1), "thou shalt not take her sister;" as Wharton in his *Polyglott sororem uxoris tuæ in pellicatum non assumes*; but he said, if the same propinquity of degrees is

Continued, *post*, p. 107, 141, 152, 167.(1) *Post*, p. 108, 169.

(a) Co. Lit. 235 a. and Butler's note, *ibid.* And see 1 Thomas's Co. Lit. 128. *Post*, p. 170.

prohibited, this will be prohibited too. *Vide gradus enumerat'* in Stat. 25 H. 8, 22: and

In one *Harrison's* case they granted a prohibition, where the party married his great aunt (b). *Pur l'assent de tous les judges de Angleterre.*

(b) The widow of his great uncle. *Vid. S. C. Vaughan*, 206. 2 Ventr. 9.

[ 74 ]

## DE TERM. S. TRINITATIS, 1673.

IN COMMUNI BANCO.

( C. 89. )

## ALLEN v. SPENDLOVE.

S. C. 2 Ab. Eq. 305. *Post*, p. 85.

A. devises lands to his son B., and if B. die without heirs, to B's brother: B. takes an estate tail by implication.

A MAN hath issue A. and B. and devises lands to A. and if he die without heirs, B. his brother shall have it: It was said by the Court that this shall create an estate-tail in A., because it appears in the will that the testator must intend an estate-tail; for that it is impossible for him to die without heirs whilst B. his brother was alive; and so they said it had been often ruled; as in the case of *Herne* and *Allen*, Cro. Car. 57; and in the case of *Hill* and *Power* (a).

(a) Acc. *Nottingham v. Jennings*, 1 Willes, 369; and see note (8) to *Purefoy v. Rogers*, 2 Saund. 388 a. 4th ed. P. Willms. 23. *Goodright v. Goodridge*,

( C. 90. )

## SIMON MASON'S CASE.

Attorney committed and removed from the roll for being *ambidexter*.

A PETITION was exhibited against S. Mason, and articles alleged and proved, *inter alia*, that he had been an *Ambidexter*, viz. after he was retained by one side he was retained on the other side; and for this was committed to the Fleet, and turned out of the roll. He was prosecuted by Sir John Huit and others (a).

(a) It is actionable to call an attorney *ambidexter*. Godb. 214. Yelvert. 32. Finch's Law, 186.

[ 75 ]

( C. 91. )

## ANONYMUS.

Court refused to set aside a judgment entered up on a warrant of attorney after the defendant's death, where he was alive on the day to which the judgment related.

(1) *Vid. Co. Lit.* 260 a. 3 Bl. Com. 407.

A. GAVE a warrant of attorney to B. to confess a judgment. A. dies the 3d of November, and after B. enters up the judgment in the same Michaelmas Term. *Nudigate* moved to set aside the judgment, because it was entered after the party was dead. But the Court would not do it; because the judgment being entered in Michaelmas Term, it relates to the 23d of October the first day of the Term, and then the party was alive; and now being in another Term they could not alter a record, because it was not now in their breasts (1); but if it had been moved in the same Term, perhaps it might have been otherwise (a).

(a) See *Odes v. Woodward*, 2 Ld. Rep. 368-9; and see 2 Stran. 1081. 1 Raym. 766. *Heapy v. Parris*, 6 Term Saund. 219 e. note.

## LORD BYRON'S CASE.

( C. 92. )

S. C. not S. P. ante, p. 67.

SIR WILLIAM JUXON, in his suggestion, had pleaded part of the act of parliament, but had left out the recital of a proviso; whereupon he was fain to mend his suggestion, and recite the whole of the act that did concern these parties; for when a private act is pleaded, it is not good to say *inter alia inactitat' est*, &c. but if it concerns several distinct matters, to recite all that concerns the *materia subjecta*, and to aver that it is all that concerns this matter; and so it was here done. Whereupon a rule was granted for a prohibition. But Sir William Juxon having sued in the Spiritual Court, and sentence against him, and that he should pay costs, it was prayed by the defendants that the prohibition might not excuse him for the costs; and for that *Nudigate* cited Cro. Car. 46. But *Baldwin* took this difference; where the Spiritual Court hath jurisdiction at the time of the suit, and after this is taken away by act of parliament (1), there the prohibition shall not excuse the costs; but if they had no jurisdiction of the cause, it is otherwise; and so it was here awarded for the whole.

When a private statute is recited in pleading, it is not enough to say "*inter alia enactitat' est*" (a). After sentence and costs assessed in the Spiritual Court, a prohibition will extend to the costs, if the Court had no jurisdiction. 1 Term Rep. 552.

But these persons that were sued by Sir William Juxon, being persons that had paid their tithes to my lord Byron, and his title in question, his solicitor acquainted the Judges that he was in parliament, and so could not attend his suit, and referred himself to their discretion, whether they would grant the prohibition or no. Whereupon they ordered that the rule should stand, but no prohibition be taken out. *Sed adrisare volunt.*

Privilege of Parliament.

(a) Yet it seems that this mode of pleading a statute is sufficient. Plowd. 65 a. 3 Keb. 648. Viner, tit. Inter alia, pl. 2. Heath's Maxims, p. 111, Cunningham's edit. The party pleading it is under no obligation to recite more than makes for himself, but may leave any subsequent and separate proviso to be insisted upon by the adversary, *Jones v. Axen*, 1 Ld. Raym. 120. Plowd. 105 a.

Cro. Jac. 140. Bac. Abr. Statute, (L) 3. Where, however, any exception or proviso is contained in the enacting clause, or incorporated with it by words of reference, the party who pleads the clause must also notice the exception. *Jones v. Axen*, *ubi supra*. *Gill v. Scrivens*, 7 Term Rep. 31. *Steel v. Smith*, 1 Barn & Ald. 94, 99.

## GROVE v. WOLLESCUTT. — In C. B.

S. C. Carter, 219.

[ 76 ]  
( C. 93. )

EDWARD GILMORE seised in fee hath issue John (who was dead), Edward, Goddard, and George before the settlement, and afterwards hath issue John, Benjamin, and Stephen, and being so seised makes a feoffment to the use of himself and his wife for life, and then to Goddard, his second son, then living, and the heirs of his body; and for default of such issue, to the use of his fifth son, and so to his sixth son. Edward and his wife are dead, and George died without issue, and so did Benjamin. The plaintiff claimed under Stephen, and the defendant under John. The question upon the whole matter was, whether the computation of sons

A remainder in a settlement was limited to the settlor's fifth son: *quære*, whether, in computing the fifth, the eldest son (who was dead at the time of the settlement) ought to be included?



should begin from him that was dead, or whether the eldest, that was alive at the time of the conveyance, should be accounted the first? For if the computation began from him that was dead, then John was the fifth son, and took by virtue of the limitation, and so the defendant that claimed under him had a good title: But if Edward, who was the eldest alive at the time of the settlement, were to be accounted the first, then the plaintiff who claimed under Stephen would have a good title; for Benjamin being dead without heir, Stephen would take by virtue of the limitation to the sixth son.

*Nudigate pro quer'* argued, that in limitation of uses the intent of the party shall be taken; and Hob. 303, the description of a person shall be taken according to vulgar acceptance; besides, this is the fifth son also in a legal acceptance; as Dy. 14, and 8 Co. 88. In conveyance of a title in a formedon, where the son is dead, no notice shall be taken of him. If a limitation had been to the first son, it would certainly have been the first living, and so the second shall be reckoned the next to him, and so on, &c. Besides, in this very limitation he calls Goddard his second son; and, if so, then it is clear that his intention was, that his computation should begin from his first son living, and not from him that was dead.

*Baldwin pro def'* argued, that the computation must begin from him that was dead, and then John is the fifth son, and so hath a good title. The best way to resolve this would be by asking of a question, who is the fifth son of Ed. G? (1) It would be answered, John. Besides, his intent is clear; for by another deed (found in the special verdict) he \* hath made provision for George, and his sixth son, and his seventh son; and for such default, then for his fifth; so that he did look upon John as provided for sufficiently in the former conveyance, and so made no provision for him in this; and the intent of the parties shall be taken; nay, it shall be made out by averment; as the 5 Co. 68, where a man hath two sons of a name, &c.

Besides, here are six defendants, and an entry is made but upon one of them, and this shall not vest the estate of the other five; for if a disseisor make a feoffment severally to six persons, an entry upon one will not serve to vest the estate for the whole (a), and that is the difference taken, where an entry is to vest an estate, and where the party hath an estate in law in him, and the possession in no man; as when an heir enters after the death of his ancestor, for there an entry into one parcel shall vest the whole. 1 Inst. 15 b. And so if a feoffment be made upon condition, &c. *Vide Dy.* 337. 9 H. 7, 25. Bro. Ent. 92. And so the plaintiff can

(1) *Vid. Cart.*  
220.

[ \* 77 ]

If a disseisor makes a feoffment severally to six persons, an entry by disseisee upon one will not revest the whole. Co. Lit. 252 b. Viner, tit. Entry, B. [See the statement of the case in Carter's Rep.]

(a) An entry to revest a freehold must ensue the action for the recovery of it. (Co. Lit. 252 a). i. e. where there are several tenants of the freehold, there

must be several real actions for the recovery of that part of which each is in possession; and therefore an entry into each part is necessary.

have title but to a part; and day was given to argue it again (b).

(b) Judgment was given for the defendant. See the resolution of the Court in Carter's Report, where it appears that the limitation was to the *fifth begotten* son of the settlor and his wife; and this word *begotten*, although omitted in Free-

man's Report, is particularly adverted to by C. J. Vaughan, as denoting the order of birth. See *Chadwick v. Doleman*, 2 Vernon, 528. *Trafford v. Ashton*, Id. 660. *Lomax v. Holmeden*, 1 Ves. Senr. 290.

### GRAVES v. ASHENHURST.

( C. 94. )

S. C. Vaugh. 173, by the name of *Crowley v. Swindles & Al.*

THE defendant avows for a rent-charge granted out of the 20 acres the *locus in quo*, &c. *per nomen* of all his lands and tenements in King's Norton (which was 200 acres). And upon oyer of the deed it appeared, that the plaintiff granted a rent of 20*l. per annum* after the decease of Anne Graves and Thomas, &c.; and if the said rent of 20*l.* shall happen to be behind at any of the Feasts when it shall become due, it shall be lawful to enter (1) and distrain during the joint lives of Anne and Thomas.

Two exceptions were taken. 1. It is alleged that the rent was granted out of 20 acres, *per nomen* of all his lands and tenements in King's Norton, which was 200 acres. *Per Cur.*—It is good enough; because it is alleged, that these 20 acres were parcel of the 200; and if it was granted out of the whole, it was granted out of every part; and this differs from Cro. Eliz. 662, where lands in possession were granted *per nomen* of lands in reversion, for it was impossible those should pass. Plow. 150 b. [Cro. El. 822.] (a).

2*d. Excep.*—The clause of entry and distress in the deed differs from the allegation in the declaration; for it \* appears by the deed, that the distress and entry was given but during the lives of Anne and Thomas, and the rent was not to commence till after their deaths. Answered *per Cur.*—Where words are repugnant or insensible, they shall be rejected; and cited Cro. Eliz. 420; so here the words, "during the joint lives of Anne and Thomas," are altogether repugnant, (for it appears that the rent was not to commence till after their decease,) and so shall be rejected; and so, notwithstanding they are dead, it was adjudged, that the distress was well taken, and as if those words had never been in. Judgment *pro le avowant* (b).

Defendant averred that A. was seised of 200 acres in K. N. whereof the *locus*, &c. containing 20 acres was parcel, and avowed for a rent granted by A. out of the said 20 acres, by the name of all his lands, &c. in K. N.: The *per nomen* was held good. [See the pleadings stated in Vaugh. Rep.] (1) "Into all the lands of the grantor in K.N." *Vid.* Vaug. 174.

Where a rent [ \* 78 ] is granted by deed to commence after the decease of A. and B. with a power of distress "during the joint lives of A. and B.;" the latter words shall be rejected as repugnant.

(a) As to a *per nomen* in pleading, see *post*, *Fowle v. Dogle*, p. 126, 157. Viner, tit. *Per Nomen*. *Throckmerton v. Tracy*, Plowd. 150-1. Heath's Maxims, (by Cunningham,) p. 113-4. *Quere*, if it be necessary or useful? *R. v. Hun-*

*gerford*, Lutwyck, 1096. Bro. Pleadings, pl. 66. 2 Saund. 305 b. n. (13).

(b) *Vid.* *Berrington v. Parkhurst*, 3 Atk. 135. S. C. Willes, 827. Bac. Ab. Grants, (I). Com. Dig. *Parola*, A. 22.

### ANONYMUS.

( C. 95. )

UPON the suggestion of a *modus* the Courts do use to grant prohibitions without notice given to the other party.

Prohibition granted without



notice upon suggestion of a *modus*. No prohibition after sentence, where the Spiritual Court has jurisdiction of the

If they proceed to sentence in the Spiritual Court in a cause where they have jurisdiction of the libel, the Court will not grant a prohibition; but if it be of a matter whereof they had no jurisdiction, they will grant a prohibition, although it be after sentence (a).

libel: *aliter* where it has no jurisdiction. *Post*, C. 358.

(a) Com. Dig. Prohibition, D. *Offley v. Whitehall*, Bunbury, 17. *Full v. Hutchins*, Cowp. 422. *Blacquiere v. Hawkins*, Dougl. 377. Yet in a suit for tithes, where a *modus* was pleaded and interlocutory sentence given in the Spiritual Court, which was confirmed by the Court of Appeal, a prohibition was granted to both Courts. *Darby v. Cosens*, 1 Term Rep. 552. And where the Spiritual Court has original jurisdiction over the subject of the libel, yet if it can be collected from the proceedings there, that

a matter of common law cognizance has been incidentally determined otherwise than the common law requires, a prohibition will lie even after sentence. *Gould v. Gapper*, 5 East, 345. *Shotter v. Friend*, Salk. 547. Com. Dig. Prohibition, D. *Sed vid. Ld. Camden v. Home*, 4 Term Rep. 397, *per* Buller, J. *Symes v. Symes*, 2 Burr. 813. On prohibitions after sentence, see further, Viner, tit. Prohibition, L. a. M. a. *Endike v. Steed*, *post*, p. 294.

( C. 96. )

#### PETTY'S CASE.

The Court cannot stay the passing of a fine after payment of the king's silver. 2 Inst. 517. Hob. 330. Barnes, 214. The commissioners fined for taking the acknowledgment of an infant *et*. 13.

THE Court was moved to stay the passing of a fine, which was acknowledged by the lady Petty's daughter, an infant of the age of thirteen; but because the king's silver was paid, it was gone too far; but they assigned the infant a guardian, who had instructions to bring a writ of error to reverse it. And they fined Sir Nic. Roe and the other commissioners, and threatened all that had a hand in the promoting of it. *Vide* 5 Co. 39. Dy. 220(a).

(a) *Vid. Hungate's case*, 12 Co. 122-3. *Griffith's case*, 12 Mod. 444. *Hutchinson's case*, 3 Lev. 36; and 2 Show. 281.

In the two last cases the fine was vacated on motion, after payment of the king's silver.

[ 79 ]

#### DE TERM. PASCHÆ, 1673.

IN COMMUNI BANCO.

( C. 97. )

#### BELLAMY v. PLAYER.

Death of a party between verdict and judgment is no ground to arrest judgment.

(1) *Vid. Salk.* 77, 78, 315.

THE plaintiff had obtained a verdict at the last assizes; and because he was since dead it was moved (by Serjeant *Mainard*) for the defendant, that judgment might be stayed; for he said, at the common law it was always admitted a sufficient allegation to arrest judgment (1); and the reason of it was to prevent the defendant of the trouble of bringing a writ of error, which would have been a circuitry as it were; and he said, notwithstanding by the statute of 17 Car. 2, c. 8, it is now enacted, that the death of either party after verdict, and before the judgment, shall not be alleged for error; yet he said, that, they now coming before judgment was entered, he apprehended they were out of the statute. *Sed*

*Curia e contra*; for if it shall not be alleged after judgment for error, by the statute, certainly it was never intended that it should be admitted a sufficient cause to stay judgment.

Whereupon he said, he had affidavit that the verdict was not fairly obtained, and that the jurors eat at the plaintiff's charge; and so said they were in an ill case; for, notwithstanding this was sufficient cause for a new trial, yet the plaintiff being dead, it was not possible for them to have that. But the Court told him, if he could prove his allegations, \*they would set aside the verdict; which accordingly was done *nisi causa*.

They were considering of fining the jurors, but then be-  
thought themselves of the general pardon of the king; granted the last sessions of parliament, which had pardoned them.

(a) Co. Lit. 227 b. Bull. Ni. Pri. 326, 327. 21 Viner, 448—453. 6 Ves. Junr. 90.

The Court will set aside a verdict for the plaintiff upon proof that the jurors eat at his charge, notwithstanding the death of

[ \* 80 ]  
the plaintiff since verdict (a).

Misconduct of jurors included in a general pardon. *Ante*, p. 4. Moo. 599. 17 Viner, 24. *Post*, C. 549.

#### PARADISE v. SHELLEY.

AFTER a verdict for the defendant, the plaintiff moved to stay judgment, and that he might have a new trial; and for cause suggested, that three of his material witnesses which were *subpœna'd*, did not appear, whereby he failed in his proof. *Sed Curia negavit*; for if he had found his witnesses had been absent, he might have been nonsuit; and if this were admitted, every verdict might be set aside; for it would be but the plaintiff's leaving a witness or two at home, and then suggest the want of them for cause for a new trial.

( C. 98. )

No new trial for the absence of material witnesses.

2 Salk. 645. 6 Mod. 22. Bull. N. P. 328. 21 Viner, 484. 2 Chit. Rep. 195.

#### HICKS'S CASE.

AN action was brought for these words, "Frances Hicks was brought to bed of two boys," (the plaintiff being a feme sole). It was moved in arrest of judgment, because she doth not allege that she had any special damage, and then it is no more than if he had called her "whore," for which she shall have no action without special damage. But by *Vaughan*, C. J. if it had been said that "she had a bastard," these words had been damageable in themselves (a). *Sed Curia advisare vult*.

Whether it be actionable to say of a feme sole that she was brought to bed of two boys, without special damage. *Ante*, C. 62: *Post*, C. 302.

(a) *Post*, *Ford v. Fletcher*, p. 275.

#### GLOYNE v. GILBERT.

GILBERT (a parson) sued the plaintiff in the Spiritual Court for these words, "thou art a knave, a liar, and a rascal." And *Nudigate* moved for a prohibition, because they are only words of heat and scolding, and cited 2 Rol. 296, No. 19. 297, No. 22, 23. If he had said he had been a common liar, it had been cause of deprivation. *Per Ellis*.—And then certainly it had been good cause to sue in the Spiritual

( C. 100. )

Whether a suit in the Spiritual Court for calling a parson a knave, liar, and rascal shall be prohibited?

Court. *Atkins*.—He is a liar if he tell but one lie, and why should we intend it in the worst sense of a common liar; so that the question is, how it shall be intended. *Vaughan*.—  
 [ \* 81 ] That \* case in Rolle, 297, charges him with one particular act only, of lying upon the subject matter. *Sed adjournatur* (a).

(a) *Vid. Anonymous*, Comyn Rep. 25. 2 Salk. 548. Lutw. 1054. 1 Ventr. 2. *Musgrave v. Bovey*, 2 Stra. 946.

( C. 101. ) *PIERSON v. HUGHES. Intratur Mich. 24 Car. 2. Rot. 365.*

Continued from p. 72.

In debt on bond with condition to pay the plaintiff all monies which he had spent or should spend in a suit *inter alios*, wherein he was attorney: held that unlawful maintenance must be specially pleaded, and cannot be objected to on *oyer* and demurrer. Held also that performance should be pleaded to the first part of the condition; for it is lawful for an attorney to take security from a stranger for past expenses.

Alley, 60.

Bro. Champertie, pl. 9.

*Semb.* No distinction, in maintenance, between giving money or a security for it. *Per Vaughan, C. J.*

THE plaintiff had been solicitor for the defendant in several suits, and an obligation was given by three others, to pay all such sums of money as are or should be laid out by the plaintiff in the several suits depending for the defendant, wherein the plaintiff was solicitor, &c. The plaintiff declares upon this obligation, and the defendant demurs. *Vide melius, ante*, Case 86.

It was argued for the defendant, that this obligation was void, being for maintenance; and though it hath been objected, that part being given for what was already due was lawful, and so however it should be good for that (a); yet it was argued by *Broome*, that the whole taken together was maintenance; for the securing of what he had laid out, and what he should, does give life and spirit to the attorney to sue, and so is according to 1 Inst. 368 b. a bearing up, or upholding of quarrels and sides; and whereas it hath been objected that it may sometimes be an act of charity to be security for a poor man, because it may be a means to help him to the recovery of his right; as to that, the law hath provided a remedy for him, for he may be admitted *in forma pauperis*; and therefore upon the whole matter this seems to be a supporting of quarrels, and is an encouragement to one part, and a discouragement to the other.

*Turner pro quer'* argued *ut prius, quod vide, ante*, Case 86, and said farther, that it did not appear here that any maintenance was committed, and so it is not reason the party should suffer, *non officit conatus nisi sequatur effectus*: But *Vaughan* answered to that, that it was true that the party could not be indicted for maintenance till it were committed; no more could he for murder; but yet if a bond be given to maintain, or to kill, certainly the bond will be void, though the acts never ensue; and he said it will be hard to distinguish, in point of maintenance, between giving of money and giving security for it.

(a) Where a bond is conditioned to do distinct things, one of which is illegal at common law, it is only void *pro tanto*: but if part of the condition be void by statute, the bond is void *in toto*. *Norton*

*v. Simmes*, Hob. 14. 1 Wms. Saund. 66 a. n. 1. *Layng v. Paine*, Willes, 574, and note *ib.* *Newman v. Newman*, 4 Maul. & Selw. 66.

*Windham*.—As the defendant hath pleaded, it seems to be something strong against him; for there is a difference when \*the condition is to do a thing that is plainly unlawful in itself *prima facie*, as to kill a man, &c. and when it is to do a thing that may be either lawful or unlawful according to the circumstances of the thing, as it is here; so there may be lawful maintenance, and *non constat* here, whether or no the obligors were not relations of the party, or perhaps the party might be lessee, and they might be reversioners; and therefore the defendant should not have demurred, but should have pleaded that the bond was for maintenance, and then it had come properly on the other part to have shewed how and upon what account they might lawfully maintain, *ut prius*; but now the defendant had tied the plaintiff up by his demurrer that he could not come in to shew the matter.

Where the condition of a bond [ \* 82 ] is plainly unlawful, *prima facie*, as to kill a man, the defendant may crave *oyer* and demur: but if it may or may not be lawful, as in case of maintenance, he must plead specially. *Per Windham, J.*

*Atkins* took a difference, that if the suit were ended, any person might be security for the fees and charges expended, but not while the suit was depending; for the securing what was laid out did encourage the proceeding in it; and the Judges ought to discountenance any thing like maintenance. *Non bene ripis creditur*.

It was agreed by all the Judges, that the client himself might give the attorney bond for his fees; or that, after the suit is ended, any body else might be bound with him for security of what was laid out. *Sed Curia advisare vult*.

A client may give his attorney a bond for his future fees. *Ante*, p. 72.

Afterwards, in this same Term, *Vaughan*, Chief Justice, delivered the opinion of the Court, that judgment ought to be given for the plaintiff, because the defendant demurring generally, it cannot appear whether the maintenance was lawful or unlawful; and it might be that these persons were relations that might lawfully maintain; and *nullum iniquum in jure præsumitur*; and besides, he ought to have pleaded performance of that part, which was lawful; for it was lawful to be security for what had been laid out before; for though it was a question formerly, whether an attorney might lay out his proper money for his client, yet now it was made clear that he might, since the statute 3 Jac. *Ideo per Curiam jud. pro quer' (b)*.

(b) It appears that the antient doctrine of maintenance has undergone some relaxation; see *Master v. Miller*, 4 Term Rep. 340. An attorney may conduct a cause gratis from motives of charity. *Ashford v. Price*, 3 Stark. 185. *Vid.* 1 Hawk. c. 83, § 26, 28.

### NICHOLLS v. REEVE.—In C. B.

(C. 102.)

TRESPASS for entering his close, *et quod secuit, messuit et asportavit blada et herbas, ibid.* &c. with a *continuando* of the same cutting and carrying away from the 16th of August 21 Regis ad 30 Sept. 22 Regis.

Whether trespass for entering a close and cutting corn, can be laid with a [ \* 83 ] *continuando?* (a).

\* It was moved by *Baldwin* in arrest of judgment, because

(a) T. Ray. 396. 1 Ld. Ray. 239. *Post*, C. 432, 448. Com. Dig. Pleader, 3 M. 10.

Where a trespass is improperly laid with a *continuando*, it is aided by verdict.  
1 Ld. Ray. 239.  
2 Ld. Ray. 823.

*Ante*, C. 29.  
*Post*, C. 177.

The jury shall not be presumed to have given damages for a thing naturally impossible. *Aliter*, if only legally impossible.  
*Per Vaughan*, C.J. *Post*, p. 129.  
Com. Rep. 231.  
1 Ander. 120.  
1 Rol. Ab. 576.

it was impossible, when he had cut the corn there growing the 16th of August, 21, that he should continue cutting it till the 30th of September, 22; for corn doth not grow all the year, and so damages being given intire, it is naught, because the jury, perhaps, might give damages in respect of the continuation, which is impossible; and he compared it to an action of the case for three assumpsits, and one is ill laid, if damages intire be given, it is bad for the whole, and cited Hob. 189, 178. 10 Co. 130. *Osborn's* case, where the differences are taken. Dyer, 370. 2 Bulst. 20.

But *Vaughan* said there is a difference between things legally impossible, as in the case of assumpsits, there, though one be bad, yet it shall be presumed that the jury gave damages for it, because it is only legally impossible; and *non constat* to the jurors whether by law it were good or not; but where a thing is naturally impossible, as it is here, it cannot be presumed that the jurors gave any damages for that which they might, by presumption, know to be impossible. *Vide* 10 Co. 131. Where for words spoke at several times an action is brought, and part are actionable, and part not, and intire damages given, it is naught; but otherwise if they be spoken at the same time. *Sed adjournatur* (b).

(b) See the cases collected in notes to *Hambleton v. Veere*, 2 Saund. 171.

### ( C. 103. )

### PHILLIPS v. CRAWLY.

The Courts of common law will give credit to the sentences of the Spiritual Courts, in matters wherein the latter have concurrence (a).

1 Sid. 170, 220.  
1 Kebl. 780.

(1) *Vid.* 1 Vent. 15.

[ \* 84 ]

Deed, which had been read

TRESPASS, with a *continuando* from Anno 65 till 71, in the rectory of Anrersham in Buckinghamshire, in a trial at bar. The case was, that Phillips was presented in 58, by the keepers and one Minshen being patron; upon the pretence of a contract to pay Minshen 100*l. per annum* so long as he should be incumbent, he was cited into the Spiritual Court in 63, and there was sentence of deprivation against him for simony; and, upon his appeal to the delegates, the sentence was confirmed: afterwards he was cast upon a trial in the King's Bench, and another at Ailsbury: And now he brought his action again, *ut supra*, and he was fain to prove his ordination, and that he was of the age of twenty-four at the time of his ordination; and that he was presented and in possession (for in those times there was no induction (1),) and then he proved his entry in 65: But laying it with a *continuando*, he was fain to prove another entry; and that being within a year and a half of his first entry, \* if he had recovered, he could have recovered damages but to the time of his last entry, which was but 18 months.

The defendant produced a deed under the plaintiff's

(a) See Buller, N. P. 244. *Dacosta & Villa Real*, 1 Stra. 661. *Allen v. Dundas*, 3 Term Rep. 125. Hargrave's Tracts, 451; and the judgment of C. J. De Grey in the *Duchess of Kingston's* case, 11 State Trials, 261. The influence and effect of prior adjudications in

Courts of concurrent or exclusive jurisdiction are discussed in the two following cases, which occurred in the Courts of Ireland: *Hume v. Burton*, reported from MSS. in 5 Cruise's Digest, 536, 541; and *Maingay v. Gahan*, Ridgw. Irish Term Rep. p. 1.



hand and seal, whereto were witnesses' names; but because they did not prove the witnesses dead, nor that they were gone to sea (*b*), though they alleged it, it was not permitted at first to be given in evidence; but afterwards, upon proof that it was read at the former trial, it was suffered to be read. The defendant also offered to read the proofs in the Spiritual Court, but was not allowed, for those Courts are no Courts of record (*c*). But the sentences of deprivation were suffered to be read (*d*). But it was objected against them by the plaintiff's counsel, that it was not reason the plaintiff should be concluded of his interest in his freehold in the Spiritual Court. But as to that, the Court answered, that the Spiritual Court did not by sentence oust him of his freehold, but that it was a consequence of their sentence; and that simony being a matter that they had properly consusance of, (for although since the 31 Eliz. cap. 6, the Temporal Courts have jurisdiction, yet that statute hath not taken away that jurisdiction that the Spiritual Court had at common law), they ought not to ravel into the grounds of their sentences, but to give credit to them; as they should in a certificate of marriage, or bastardy, and other things which lie properly within their cognisance; so that they must take him as guilty of simony, being deprived for it in the Spiritual Court.

Whereupon *Baldwin* for the plaintiff alleged the act of oblivion, which was in 1660, two years after the defendants had alleged the offence was committed: and so by that it was pardoned. But to that the Court made answer,—That if he would have taken benefit by it, he ought to have pleaded it; for though it be a general act, yet there being several persons excepted, he ought to have pleaded, and shewed that he was none of the persons excepted; whereupon the plaintiff, seeing the Court incline against him, was nonsuit.

*Vaughan* asked *Ellis* this question:—That supposing there was a general pardon, and the party did not plead, nor the judges did not take notice of it, whether the party might have remedy by writ of error? And *Ellis* said no; because they could allege nothing for error but what did appear in the record; to which *Vaughan* assented (*g*).

at a former trial, admitted without proof by attesting witnesses. 12 Viner, 133-6.

Sentence of deprivation against plaintiff for simony, is good evidence against him in a Court of law. 21 Vin. 351.

A man cannot be *directly* ousted of his freehold by the sentence of a Spiritual Court: but he may by *consequence*. Cro. El. 788.

The Temporal and Spiritual Courts have concurrent jurisdiction of simony since 31 Eliz. c. 6 (*e*).

Where a general act of oblivion contains an exception of several persons, a party must plead it, and shew himself not within the exception (*f*).

A general pardon is not available on error. Jenk. 258. 17 Viner, 58. Foster, 42—45, 67.

(*b*) 1 B. & P. 360. 1 Taunt. 461.

(*c*) Acc. March, 120. 12 Viner, 108. Bull. N. P. 242. But the better opinion is, that depositions, taken judicially in the Ecclesiastical Court or in any other Court of competent authority, are evidence on the same footing and under the same limitations as depositions in Equity: as to which, see Gilb. Evid. 66, 57, ed. 1777, and 1 Phillipps on Evid. Part 2.

(*d*) *Vide Phillips v. Bury*, 2 Term Rep. 346. *R. v. Grundon*, Cowp. 315. *Baker v. Rogers*, Cro. El. 788.

(*e*) Gibb. Codex, 840, edit. 1713.

(*f*) Cro. Car. 449. Hob. 81. 6 Co. 79. 3 East, 86. But where the exceptions are in a subsequent proviso, the party pleading the act may leave his opponent to insist upon them in his reply. 2 Hawk. c. 37, § 60. *Ingram v. Foot*, 12 Mod. 613. 17 Viner, 57. As to the effect of a pardon of simony, see *post*, *R. v. Turvill*, p. 197.

(*g*) "Error in law is ever of such matters as do appear upon record, and error in fact is ever of such matters as are not crossed by the record." Bacon's Maxims, Reg. 17.

## ( C. 104. )

## ALLEN v. SPENDLOVE.

S. C. *Ante*, p. 74.

A devisor has three sons, A., B., and C., and devises lands to B. and C., "and if B. dies without heirs, C. shall have his part; and if C. dies without heirs, A. shall have it." *Semb.* B. has an estate tail, and C. an estate for life, in their respective moieties. 8 Viner, 259.

THOMAS HIGDEN hath three sons, Thomas, Bartholomew, and Robert, and devises lands to Bartholomew and Robert, and if Bartholomew dies without heirs, Robert shall have his part; and if Robert dies without heirs, Thomas shall have it.

The question was,—What estate Robert had in his moiety? for it was agreed that Bartholomew had an estate-tail by implication, by virtue of the words subsequent to the devise, viz. *And if Bartholomew die without &c.* [1 Rol. 844.]

It was argued by *Maynard*, that Robert should also have an estate tail, because those words that did give were the same to both of them; and then, when the testator had by the subsequent words declared what estate he did intend to pass to Bartholomew, when he says, "I devise to Bartholomew and Robert," the words being the same to Robert, shall carry the estate to him in the same manner.

*Nudigate* argued *e contra*; for that by the first words, if the testator had gone no farther, but only said, "I devise these lands to Bartholomew and Robert," neither of them had had but an estate for life; and then, when the testator by subsequent words enlarges the estate of one of them, and restrains it to the part of one of them (by saying "Thomas shall have it") this word "it" shall relate only to Bartholomew's part that was before devised to Robert if Bartholomew dies without heir: And the Court inclined to this latter opinion, that Robert had but an estate for life in his moiety, because implications that carry estates ought to be plain and strong; and so gave judgment *nisi*.

*Ante*, p. 11.

## ( C. 105. )

## THOMAS v. SORRELL. — In Cam. Scac. (a).

S. C. Vaugh. 330. 1 Lev. 217. 2 Kebl. 245, 280, 322, 372, 416, 790. 3 Kebl. 76, 119, 143, 155, 184, 223, 233, 264.

The king may grant a dispensation to sell wine without a licence, *non obstante* the stat. 7 Edw. 6; and the dispensation is not determined by the king's death. Such a

[ \* 86 ]  
dispensation is valid as well when granted

THE case was this: King James by his letters patent did incorporate the vintners of London, and in the same letters patent did grant for him, his heirs and successors, to them and their successors, that it should be lawful for them to sell wine without licence, *non obstante* the statute of 7 Ed. 6, 5, by which it was enacted, that none should sell wine without licence, &c. under the forfeiture of 5*l.* a-day, to be divided betwixt the king and the informer; and this action was *tamquam*, &c. (b).

\* In this case these three points were moved:

1. Whether the letters patent were good in their creation (c)?

(a) This case after several arguments in the K. B. was adjourned for its weight and difficulty into the Exchequer Chamber. 1 Lev. 218. Thurland, Wyndham, Ellis and Turner, C. B. held the patent void: Thurland and Turner, C. B. held that, if good, it determined by the king's

death: Thurland alone was of opinion that the company was not protected by the proviso of the 12 Car. 2. 1 Lev. 221.

(b) See the case more particularly stated in Vaughan, 330-1.

(c) This point alone is discussed in Vaughan Rep.



2. Admitting them to be good, Whether they did not determine by the death of the king?

3. Admitting that they were good, and did bind the succeeding king, whether they were not destroyed by 12 Car. 2. 25, or were saved by the proviso in that statute?

This day being the Saturday in the Term, it was argued by Baron *Thurland* and Justice *Ellis* (d), the two *puisne* judges. *Windham* argued that the patent was void in its creation, as *Ellis* did.

*Ad primam quæstionem*: Whether these letters patent were good in their creation? And they both held them to be void for these reasons:

1. From the nature of a dispensation, which is defined 11 Co. 88. *Dispensatio est mali prohibiti provida relaxatio utilitate seu necessitate pensata, et est concessa Domino Reg' propter impossibilitatem providendi de omnibus particularibus*; so that it ought to be to particular persons upon a judgment made of the necessity or convenience of it. And here it is impossible that the king could make any judgment of it, for it extends to as many persons as they shall please to make free of their corporation, and how many that will be, it is impossible for the king to foresee, for it must be *provida et de particularibus*: And though the king may dispense with particular persons, yet he cannot with places, nor with a point in the civil law, *come de chose concern le Admirals Jurisdiction*. 2 Rolle, 179. No. 50.

2. *Ellis*.—The law of 7 Ed. 6, was made *pro bono publico*; and the people have an interest in all such laws, and the king cannot dispense with them. 3 Inst. 324. Rolle, 179.

The king cannot dispense with the repairs of a bridge. Plow. 487.

Where an act gives the benefit solely to the king, he may do what he will with it, *quia quisque potest renunciare juri pro se introducto*; but if the subject be concerned, it is otherwise.

*Windham* (e).—If the statute be made for the benefit of the king only, he may dispense; but if it be for the benefit of the subject only, he cannot; as the statute of tithes, 2 Ed. 6, where the party hath all the benefit, the king cannot dispense.

\* 3. It is a patent *primæ impressionis* without any precedent, and the Judges ought to be wary of admitting such innovations: besides, many inconveniencies might follow upon it. Might not the merchants as well get a patent to import all foreign prohibited commodities? Might not the brewers as well get a dispensation against all the penal laws concerning ale-houses?

4. This would be a delegation of a power to a corporation to dispense with penal laws, or at least it would have the same

to a corporation aggregate as to particular persons. Held also, that such a grant to the company of vintners was saved by the proviso in the statute 12 Car. 2, c. 25.

1 Sid. 6. Hardr. 338, 443, 464.

1 Mod. 260.

Cited by Somers, *arguendo*, in 11 Howell's State Tri. 396.

Post, 90. Hale's Analysis, 9.

Bro. Pat. 100. Vaugh. 354-5.

The king cannot dispense with a statute made *pro bono publico*. *Sed vid. post*, 116.

The king may dispense with a statute made for his own benefit.

[ \* 87 ]

The dispensing power cannot be delegated to

(d) See the argument of *Thurland* in 3 Kebl. 143. Of *Ellis*, *ibid.* 144.

(e) See argument of *Windham*, 3 Kebl. 158.

a subject. *Post*,  
90, 117. *Vaug.*  
354. 3 *Inst.* 186.  
20 H. 7, 8.

effect; for they may make as many of their corporation as they please, and all should be impowered to sell wine without licence; and the law hath always taken care that the subject shall have nothing to do with dispensing with penal laws. The king cannot delegate this power to another. 7 Co. 36. Co. Ent. 370. The king cannot give the forfeitures of a penal law to a corporation; for that would be to enable them to dispense with the law. Hob. 183.

*Windham.*—This is worse than giving a power of licensing to a private person; for these never die, but for particular persons *statutum est omnibus semel mori*.

And he said, by this means all laws might be blowed up; for as the king dispenses with this law to this corporation, so he may with another to another, and so *ad infinitum*; nay, it would be but making a corporation of dissenters, and then he might dispense with them too.

A *malum in se*  
cannot be dis-  
pensed with.  
*Post*, p. 493.  
*Vaug.* 332-3-4.  
But may be par-  
doned.

*Ellis* objected, though the king cannot dispense with a thing that is *malum in se*, (but he may pardon it) (*f*), yet for a thing that is not *malum in se* he may license or dispense with it.

*Ans.* This rule hath many exceptions: In *Magdalen College's* case, 11 Co. 60. If a bishop grant land to the king *contra formam stat'*, no *non obstante* can make it good. *Vide* 3 *Inst.* 154, that the king cannot dispense with the taking of the oath of allegiance and supremacy by a parliament-man.

*Obj.* The case in 2 H. 7, 6, concerning sheriffs (*g*).

*Ans.* That case differs from this; for that is but to a single person, but this is to a multitude; and it does not follow, because he may dispense with a man and his heirs, that it shall be good to a corporation; for a corporation may make as many as they please of their corporation, but a man cannot make as many heirs as he pleases; *quia Deus facit hæredes*.

[ \* 88 ]

\* *Obj.* The two judgments lately given between *Norris v. Lacy*, and *Right and Horton*, in the Common Pleas in the very point.

*Windham.*—They passed without argument; for the pleas came in but in Trinity Term, and demurrer was joined in the same Term, and judgment in Michaelmas Term following; and it may be, that the Vintners might in subtilty procure those judgments, that they might have them ready to produce for authority, *ut res postulet*.

Judgments  
*sub silentio* are  
of no authority.  
*Post*, 91.

*Ellis* answered,—Those passed without argument, and *sub silentio* (*h*); and those judgments are of no authority, as it is held in *Slade's* case, 4 Co. and in the same Term the Judges did declare (being sent to) that the king could not dispense but with particular persons.

(*f*) See the powers of dispensing and pardoning distinguished in *Vaug. Rep.* 333. *Sullivan's Lect.* 19, *ad finem*.

(*g*) *Semb.* This case was never law. *Harg. Co. Lit.* 120 a. n. 3. 2 *Hawk. c.* 37, § 27. *Sed vid.* *Bacon's Tracts*, p. 88.

(*h*) See further, on the authority of precedents of judgments *sub silentio*. 1 *Lev.* 8. 1 *P. Wms.* 223. *Hob.* 112. Preface to *Douglas Rep.* p. 7. *Eunomus Dial.* 3, § 47, 48; and 1 *Stra.* 153, *Arg. Vaug. Rep.* 399. 2 *Lutw.* 1569.

*Windham*, Justice.—This act of dispensing is so appropriated to the king, that it cannot be taken away by act of parliament, neither can it be communicated to any body else; and it must flow from the king only, and no man must have to meddle with it. 7 Co. Case of penal statutes.

2 H.7, 6. *Ante*,  
p. 87. *Vaugh.*  
354.

This case is a stronger case than Sir *Walter Raleigh's* for he was to nominate, and then they did pass the Great Seal; so that he was to do only a preceding act, but here the corporation doth all; for if they please to make them of their corporation, they are licensed persons without any thing more.

If the king had granted to them, that all of their corporation should be denizens, it would have been void.

And here, although this be but for some cities and post-towns, and for taverns within three miles of London, yet by the same reason it may be for threescore miles about London, and so would be *quasi abrogatio juris*.

*Ad secundam quæstionem Ellis* argued, that if they had been once good, they had not been determined by the death of the king.

He agreed, that all bare licences or authorities were determined by the death of the party that grants them; as all commissions of judges and justices, and all protections, &c. But where an interest passes, or where an authority is coupled with an interest, or where a licence is executed, these do not determine by the death of the party.

Bare licences or authorities are determinable by the death of the grantor: *aliter*, where an interest is coupled with them, or the licence is executed. *Ante*, p. 70. *Post*, p. 91, 117, 332.

The reason why an authority ceases by the death of the party is, because it is to be executed in the name of the party that gave it, and that cannot be after his death. *Vide Dyer*, 92, 177, 270.

\* A bare authority, though it be made irrevocable, may be revoked. 8 Co. *Vinior's* case.

[ \* 89 ]  
A bare authority, though made irrevocable, may be revoked. *Bacon's Max.* Reg. 19.

But *Yonge* and *Right's* case, in C. B. Hil. 1659, Rot. 394, is express in the point. [S. C. 1 Sid. 6].

*Windham*.—This is a kind of interest vested in the patentee, or at least an authority coupled with an interest, and so shall not determine by the death of the king, as a licence to purchase in mortmain, or to make a park, for though these be executory, yet they are vested. 2 Cro. 51, 52. Plow. 457. Nat. Brev. 223. and Dy. 270, clearly admits the power of binding the successor, but there the intention is doubted.

*Atkins*, Justice, argued (i), that the patent was good in its creation, against the opinion of *Ellis*, *Windham*, and *Thurland*; and the substance of his argument was as follows:

At the common law any man might have set up a tavern, or have sold any thing else honestly to get a livelihood; and the mischiefs at the common law of taverns were, 1. Selling of corrupt wine. 2. Selling at excessive prices. 3. Evil rule in their houses. 4. Setting up taverns in back lanes. And all these were *mala in se*, and so punishable at the com-

At common law any man might have set up a tavern, or other honest trade. 1 Salk. 45. *Bac. Abr. Inns*, (A).

(i) See his argument in 3 Kebl. 155.

mon law; but the multitude of taverns was not mischievous but by accident, and was not *malum in se*, and so not punishable.

*Ante*, p. 87.

Dispensations  
were derived  
from the Ro-  
mish Church (*k*).

Before the statute of 2 Ed. 2, the king had no power to restrain taverners from setting up; but the first statute considerable is that of 7 Ed. 6, 5, and the evils there mentioned are some of them *mala in se*, and others *mala prohibita*; the *mala in se* are evil rule and disorder, &c.; the *prohibita* are selling wine without licence; the *mala in se* cannot be dispensed with, but the other may.

[ \* 90 ]

The objections against the letters patent have been, 1. That dispensations in general are but the relict of the Church of Rome. *Ans.* All things are not bad that came from thence; and we ought not to disapprove of good things because they have them. 2nd. *Obj.* Dispensations are not favoured in law. *Ans.* When they are reasonable, they are; and the king's power of dispensing is founded upon great reason, because the law-makers could not provide for all future events; and besides, human affairs are so subject to change, that those things that are useful at one time may be inconvenient at another. Hob. 146. From the king all favour flows; and as equity relieves against the common law, so do dispensations against statutes. *Vide* 2 H. \* 7, 6. 2 Roll. 180, No. 22. Cotton's Abr. 447. 2 Inst. 377. Besides, in this case it is but convenient the king should have such a power; for the number of taverns limited in the statute is but a bare conjecture; for that which was then a convenient number may be too many or too few; for the inhabitants of London do ebb and flow as well as the river; and the city is like the moon, always either increasing or decreasing. Besides, there are many freemen in the city of the trade, who have no other way of getting their livelihoods; which makes Queen Mary, in her dispensation against this statute, make very severe reflections upon it.

Dispensations  
may be granted  
to particular so-  
cieties, as well  
as to particular  
persons.

This patent doth not at all dispense with the *mala in se*, but only with the inconveniences of the statute. *Obj.* But by this means the inconveniences will soon return again. *Ans.* Here is a remedy for that; for the patent only extends to freemen, and if they abuse their liberty, they may be disfranchised. *Obj.* 11 Co. 88, where it is said, that dispensalls are *de particularibus*. *Ans.* That is not intended particular persons only, but particular societies, and in particular cases. *Obj.* In cases of dispensations, the king ought to pass a judgment. *Ans.* He doth in this case pass a judgment, for he recites *pro meliore relevamine*, so that he did see a *gravamen*. *Obj.* Those patents give licence to all that should be free. *Ans.* Those are unnecessary words, for that is no more than barely to dispense with the corporation, for then they are included. *Obj.* This patent is *primæ impressionis*,

(*k*) Concerning the introduction of the clause of *non obstante* and the early opposition it encountered from the lawyers,

see Matth. Paris, p. 700. A. D. 1251. Davis Rep. 69 b. Hurd's Dial. V. 2 vol. p. 288, ed. 1788. Sullivan's Lect. 34.

and so ought not to be countenanced but with great caution.

*Ans.* The grant *Civibus de Waterford*, 1 Ric. 3, is a good warrant for this; for that was to a whole city, and this but to a corporation in a city; but besides, it is as old as the statute itself, for the statute was made in Edward the Sixth's time, and dispensed with by Queen Mary. *Obj.* The dispensation is against all laws to be made. *Ans.* That clause is clearly void, but it doth not from thence follow that the whole dispensation is void. *Obj.* This dispensation is of too great an extent, for it reaches from one side of England to the other. *Ans.* Though it reach far, it is but in a straight line; [*I think it was to all of their Corporation in the post roads*(1);] and it is not to all the inhabitants in those places neither, but to some particular persons. *Obj.* This doth amount to a delegation of the king's power, for they may make who they will of their corporation. *Ans.* A corporation is a creature of the law, and though the members change, yet the corporation is the same still; and what the king grants flows from him at the time of the grant; and this is not \*like Sir *Walter Raleigh's* case, nor that which hath been mentioned, that if the king should have granted that all those they should name should sell wine without licence, it would have been clearly void; but this differs from that in effect, as well as in law; for in that case they might have named whom they would, and such as would not have been subject to the regulation of the corporation; but now they must be freemen, and the company must be careful whom they make of the company, for the miscarriages of the members may forfeit their charter. *Obj.* They are limited to no number, and so they may admit too many or too few. *Ans.* These are abuses of the patent, and may be a forfeiture, but will not make it void in its creation; and the case of the *City of Waterford*, 2 R. 3, 11, and 1 H. 7, answers all objections.

*Obj.* The king may dispense with statutes that concern only himself, but not with such as this is, that concerns *bonum publicum*.

*Ans.* There are several instances where the king doth dispense with statutes *pro bono publico*. *Vide* 2 Rolle, 179. 12 Co. 80. 3 Inst. 153, 154. And the distinction of concerning the king and concerning the subject is not general; but the better difference is of things that are *mala in se* and *mala prohibita* (2); and the king cannot dispense with the common law (1), and the case of *Norris and Lacy* is in the point: and whereas it hath been made an objection, that there was never any argument in that case, that is a clear argument that the Court was clear in opinion, and so never disputed it.

*Ad secundam quæst.* He held that this was at least an au-

A clause of dispensation against all laws to be made, is void, but does not vitiate a dispensation in other respects good. Bacon's Tracts, p. 87. (1) See the patent in Vaugh. 330.

[ \* 91 ]  
*Ante*, p. 87.  
*Post*, p. 117.  
*Vaugh.* 354.

(2) *Sed vid.*  
*Vaugh.* 332.  
*Ante*, p. 87.  
*Post*, p. 138.

*Ante*, p. 88, 89.  
*Post*, p. 117.

(1) *Quære*, as to the power of dispensing with common law? *Vaugh.* 334, 358. *Hargr. Co. Lit.* 120 a, n. (4).



1 Sid. 6.

thority coupled with an interest: and Dyer, 270, doth clearly prove this; for there *Catline* was of opinion, that though no certain estate was limited, yet it did not determine by the death of the king; but the other two were against him as to that; but they all seemed to agree, that if the estate had been expressed, it had not been determined; for they seem there to admit the power, but to question the intention; and *Yonge* and *Right's* case was expressly adjudged in the very point of a wine licence.

[ \* 92 ]

1 Vaug. 357.

*Ad tertiam quæst.* He held that their privilege was well saved by the proviso in the statute of 12 Car. for admitting that this statute be a repeal (as it hath been objected) of the statute of 7 Ed. 6; yet at the same time it preserves the privileges that they had lawfully used, and by express words is not to extend to their prejudice. *Obj.* This \* act intends to give a revenue to the king. *Ans.* The same act, that gives the revenue, preserves the privileges of the persons; and those that dispute in this case, and by this means, to advance the revenue of the king, do at the same time argue against his power; and *vide plus postea*, Case 137, p. 115.

( C. 106. )

## THREADNEEDLE v. LINE.

S. C. 3 Kebl. 192, 372. 1 Mod. 203. 2 Mod. 57. S. C. on error. 3 Kebl. 583, 595; and Poll. 176.

A bishop, seised of two manors which had been antiently let together at an entire rent, leased both to A., at the antient rent, for three lives. After the decease of two of the lives, A. leased a part to B. for 99 years, if the surviving *cestui que vie* should so long live, and then surrendered the whole to the succeeding Bishop, who leased the manors, (excepting the part underlet to B.) reserving the whole antient rent.

EJECTMENT upon a special verdict: the case appeared to be *ut sequitur* (a).

Jo., Bishop of Exeter, was seised of two manors, B. and T., each of them consisting of demesnes and services, and both these manors have been antiently let together, reserving one entire rent of 74*l.* *per annum*. The Bishop being so seised leased to one James Prouse both these manors for three lives, reserving the antient rent, and dies; afterwards, two of the three lives being dead, James, the lessee, leases to Jo. Prouse for 99 years, of part of the demesne of B., if *cestuy que vie* should so long live; and then surrenders both to B., the succeeding bishop, who makes a lease of the residue of both manors (b), excepting Above-Town Close, reserving 74*l.*, the antient rent, and dies. The question was, whether this lease should bind C., the successor? and it was found farther, that each of the manors was of the value of 116*l.*

*Barton* argued, that this last lease was void against the present bishop, because, though by a surrender the estate be drowned as to the parties, yet in relation to strangers it shall have continuance. 1 Inst. 338. 5 H. 5, 9. And here

(a) A more exact statement of the case is found in the report of Pollexfen's argument. Poll. 176. It there appears to have been questioned whether the reversion of the part underlet was not included in the second demise by the bish-

op, which would have made it a concurrent lease as to that part; see *Nudigate's* argument, *post*, p. 119, and p. 184.

(b) N. B. This lease was confirmed by the Dean and Chapter. Pollexf. 178.



C. the successor bishop is a stranger, and so as to him the surrender shall have no influence, and then the first lease is in being; and so the lease made by B. for three lives is void: besides, it would by this means be in the power of every bishop to make the revenue of his successor very inconsiderable, for here the lessee for years should hold the land discharged of the rent; for if lessee for life makes a lease for years, rendering rent, and then surrenders, the rent is gone, and the lessee is not punishable for waste. Moor, 94. 1 Co. *Shelley's case*. The stat. of 1 Eliz. also hath always been construed favourably for the benefit of the Church; and therefore, though it speak only of gifts and alienations, &c., if a bishop suffers an usurpation, or confirms a disseisor, it is within the statute, as appears 2 Cro. 673. Cro. Eliz. 430. Besides, a surrender to enable the bishop to make a new lease, must be absolute and perfect, as it is \*held in 5 Co. *Elmer's case*. Also here, although the old rent be reserved, yet here is not the like remedy, for he cannot now distrain in that part that is in lease for years: And he said, although it hath been resolved, that a concurrent lease in case of a bishop is good, in Moor, 107, *Fox and Collier's case*, yet that resolution is questioned in Lat. 241, 242.

*Quære*, whether the second lease should bind the successor? See the judgment of the Court. *Post*, p. 179.

[ \* 93 ]

*Maynard* argued that the lease was good; for it being found that each of the manors was of the yearly value of 116*l.* and so sufficient for the payment of the bishop's rent, he could not be prejudiced: however, if he were prejudiced, it ought to have been specially found, otherwise it shall not be intended; and he said if there be lessee for years, the remainder for life, the remainder to a bishop, the lessee for life may surrender to the bishop, and so shall be subject to waste, and so he shall here; and he confessed that leases made by the statute of 1 Eliz. must be qualified in like manner generally as leases made *per* 32 H. 8: but upon that statute 1 Inst. 44 b, a tenant in tail may lease *pro parte* and reserve rent *pro rata*.

And he said by this means the manor of T. might never be capable of being let again; for if so be the *cestuy que vie* should live so long, that the lease for years should continue for twenty years, then it could never be let again if it could not be let without that part that was leased for years, because it is restrained by the statute to lands usually let for twenty years before.

The Court agreed, that the rent upon the first lease is gone by the surrender; and that which seemed most to invalidate the lease with the Court, was because the successor had not so ample a remedy for his rent, because he could not distrain in that which was let for years. *Sed adjournatur*.

If lessee for life leases for years, rendering rent, and then surrenders, the rent is extinct (e).

(c) Acc. *Webb v. Russell*, 3 Term Rep. 401-2. 3 Preston Convey. 129—140. This is prevented in some cases by 4 Geo. 2, c. 28, and 39 & 40 Geo. 3, c. 41.

*Semb.* Though the rent be extinguished *qua* rent, it is still payable to the mesne lessor upon the contract of demise.

(1) *Vid. post*,  
S. C. p. 179.

And *Maynard* said that there, in case of the bishops, &c. which is a kind of a general law (1), there need not be that literal performance as is in the case of *Montjoy*, 5 Co. because that is a particular law that concerns that particular person. [Continued *post*, p. 119.]

( C. 107. )

GRIFFITH v. MANSELL.—In C. B.

In declaring on  
a covenant by  
defendant to

[ \* 94 ]  
deliver goods on  
request, and to  
put them in  
such quantities  
as the plaintiff  
should appoint,  
on board such  
vessels as the  
plaintiff should  
prepare, the  
plaintiff must  
aver that he ap-  
pointed the  
quantities and  
prepared the  
vessels. Com.  
Dig. Pleader,  
C. 51.

COVENANT to deliver coals upon request at the port of N. and to put them in such quantities as the plaintiff should appoint, in such vessels as the plaintiff should prepare; and the plaintiff alleges that he did request \*him, &c. at London. The defendant pleaded he was ready at the day to deliver them. And the plaintiff demurred. And it seemed to the Court that the defendant's plea had not been good, if the plaintiff's declaration had been good, but the declaration was naught for want of sufficient averment; for he ought to have averred, that he did appoint the defendant what quantities he should put into such and such vessels which he had prepared; for where the plaintiff is to do the first act, he ought to aver performance. 7 Co. 10. Style, 49, *Parmeter v. Gressum*. Besides, when the thing to be done or delivered is a matter of bulk, there ought to be a certain time agreed, and the party ought to give convenient notice (a). 1 Inst. 210 b. *Semble q' le declaration fuit male*.

(a) See as to this last point, 4 Leon. 46. *Post*, p. 483, *Harvey v. Jackson*.

( C. 108. ) BUNT'S CASE.—In Camera Scaccarii, before the Lord Chancellor, Treasurer, and two Chief Justices. *Error de judgment in Scacc'*.

Error assigned,  
because the *venire fa'* in the  
Exchequer was  
returnable on  
Ascension-day.  
Com. Dig.  
Temps. B. 3.  
1 Stra. 387.  
1 W. Bl. 526.  
Bac. Ab. Ju-  
ries, (1). *Ibid*.  
Amendment,  
(D) 4.

INFORMATION for transporting of wool, &c.

There were several errors assigned in the record; that insisted upon was, that the *venire fa'* was returnable upon Ascension-day, which is not *dies juridicus*.

*Stephens* argued that it was well enough; and he said, there is a difference when the day of the writ is impossible, [as 31 June] and when it is upon a *dies non juridicus*; as it is held in Dy. 182. And he said moreover, that if it were error, it was amendable; and for that cited 2 Cro. 432: and if it be not amendable, being after a verdict, it is helped by the statute of 32 H. 8; and for that cited Cro. Eliz. 183, where the *venire* bore date upon a Sunday, and was helped by that statute. *Pemberton pro def'* said, there is a difference between the date of a writ, for although that be upon *dies non juridicus*, it may possibly be well enough after verdict, but it is otherwise of the return of a writ; for it is all one as if it were returnable in a vacation. And whereas it was objected, that it could not be alleged here, because it was a matter of fact, and so could not be tried; he said it may be tried by the Almanack, or *per pais*; and so is Dy.

182(a). But because the Attorney-General had not replied, or at least his replication *in nullo est erratum* was not entered upon the record, my Lord Chief Justice said, the errors were ill assigned; because they had assigned several errors in fact and in law, which \*could not be; but it seemed to him, that the replication would have cured that; but if they demurred, it was naught.

[ \*95 ]  
Assignment of  
several errors in  
fact and law  
is bad on  
demurrer (b).

(a) The Court is bound *ex officio* to notice the calendar. Salk. 626. Com. Dig. Temps. B. 2. 1 Stra. 387. 1 W. Bl. 1006.

(b) In such case, the plea *in nullo est erratum* is a confession of the error in

fact, (if it be well assigned), and the judgment will be reversed. Bac. Ab. Error, (K) 2. 2 Williams's. Saunders, 101 s. But on demurrer it will be affirmed. 2 Ld. Ray. 883. 1 Stra. 439.

### HOLDER v. DICKESON.

( C. 109. )

*S. C. Holcroft v. Dickenson*, Cart. 238. 3 Keb. 148.

MARY HOLDER declared against the defendant, that whereas the plaintiff, at the special instance and request of the defendant, did assume and promise to marry the defendant within a fortnight, the defendant did promise to marry her within a fortnight; and avers that she *obtulit se*, and the defendant refused.

An action of *assumpsit* lies upon mutual promises of marriage. And it is unnecessary for a female plaintiff to allege that she offered herself to the defendant in the presence of a priest. Vaughan, C. J. *dissentiente*.

The question was, whether this was a good *assumpsit* or not. And it was argued by *Windham*, *Atkins*, and *Ellis*, that the action well lay; and their arguments being upon the same grounds for the most part, I will relate them together. They said, here were two things chiefly objected:

1st *Obj.* Marriage being a thing of ecclesiastical consanguinity, the common law takes no notice of it; and the old books that favour that opinion are these, 45 Ed. 3, 20, 24. 7 H. 6, 1. 14 Ed. 4, 6. 17 E. 4, 4. 15 Ed. 4, 33. 19 Ed. 4, 10. 20 Ed. 4, 3. 22 Ass. pl. 70. 4 Co. *Bunting's* case, where it is said, that marriage is of ecclesiastical consanguinity, and the Temporal Courts ought to give credit to them in their proceedings.

But notwithstanding this, these three Judges held that the action well lay; for that here is a mutual contract concerning a lawful act, and though the subject matter be spiritual, yet the contract is temporal; for it is said in the very statute of *Articuli cleri, per emptionem et venditionem res spirituales sunt temporales*; and *Ellis* said, that *Bunting's* case in 4 Co. was argued by the civilians; and that he had seen their arguments, and there they did say, that marriages did not antiently belong to the Spiritual Court, before the time of Pope Alexander the Third (a); for before that the husband did go and fetch his wife and lead her home, and thence

*Vid. 2 Inst. 619.*

Marriage not antiently of spiritual cognisance. *Cont.* Vaugh. Rep. p. 207, 212. *Post*, p. 167.

(a) Alexander III. is also mentioned in *Carter's Rep.* 283. But *quære*, whether Innocent III. be not intended? see *Bunting's* case, Moor, 170. 1 Bl.

Com. 439. 2 Marshall, 246, *arguendo*. And see *Davis Rep.* 51 D. 1 *Reeves's Eng. Law.* 71-2.

(1) 1 Bl. Com. 442. came *ducere uxorem*; and she was covered with a veil, which he took off, and then the marriage was consummate; *unde venit, ut puto, fœmina cooperta* (1).

*Ante*, p. 66.

And they said, that if so be there was any suit to perfect a marriage, and concerning the lawfulness or unlawfulness of a marriage, that the Temporal Courts had nothing to do with it, but it doth properly belong to the Ecclesiastical Court.

[ \* 96 ]

\* But here the action is grounded upon the contract, which is temporal, and for reparation of a temporal loss which the party hath sustained by breach of the promise, for which the party can have no remedy in the Spiritual Court (*b*); and the difference is taken in F. N. B. 44 a. If I promise so much with my daughter in marriage, it must be sued for in the Spiritual Court; but if, "I will give you so much if you will marry my daughter," it must be sued for at common law, by reason of the contract (*c*); and for this there are several authorities, that though marriage be a thing of a spiritual nature, yet it is in all cases held one of the strongest considerations in the law, either to raise a use, or else for contract. Bro. Act' sur le Case, 108. Plow. 305. Nat. Brev. 120, R. Doct. & Stud. 14. Cro. Car. 202. Dy. 272. 3 Bulst. 235.

Marriage is one of the strongest considerations in the law, either to raise a use, or to found a contract. 1 Ld. Ray. 387.

(2) *Ante*, p. 66.

*Obj.* And whereas it was objected, that these actions upon the case were things invented in the late times (2), when there was no remedy in the Spiritual Court; they said, there were precedents of this very case before the times of the troubles; as appears 1 Roll. 14, 22.

*Obj.* Here is no temporal loss. *Ans.* Here is a temporal loss; for the woman is preferred by marriage, and the loss of marriage hath always been reputed a damage, and therefore in actions for words it is ordinary to allege the loss of marriage. 4 Co. 16. 1 Roll. 14.

1 Ld. Ray. 387.

And marriage is not a thing so absolutely in the Spiritual Court, but that sometimes it is triable at the common law; as if a man plead *Ne unques accouple in loyal matrimony*,

(*b*) The rule of the canon law seems to be that spousals *de futuro*, or an executory contract of marriage, cannot be enforced by the Ecclesiastical Court, unless subsequent cohabitation or some other equivalent act has converted it into a contract *de presenti*. The only proceeding in the former case is by admonition and penance for breach of faith. See Swinburne on Spousals cited in Burn's Ec. Law, Marriage, II. Fitzgib. 176, 275. Harg. Co. Lit. 79 b. n. (4). 3 Atkins, 307. Erskine's Law of Scotland, B. 1, tit. 6, § 2. *Dalrymple v. Dalrymple*, 2 Hagg. Rep. and *M'Adam v. Walker*, 1 Dow, 148. It should seem therefore that the *dictum* attributed to Buller, J. in *Duberley v. Gunning*, 4 Term Rep.

658, that the woman cannot sue at law in cases "where she could not formerly have enforced the contract in the Ecclesiastical Court" must be understood with some limitation.

(*c*) Plowd. 309. Fulbeck's Parallel, p. 7. This distinction was condemned by Powel, J. in *Collins v. Jessot*, 6 Mod. 156, but Ld. Holt is represented to have explained the former promise by supposing it to allude to the money laid down on the book at the time of the marriage: as to which practice, see 1 Gibs. Codex, Tit. 22, ch. 10. 2 Bl. Comm. 134. Hooker speaks of this custom as "in a manner already worn out." Ecclesiastical Polity, B. 5. § 73.

that shall be tried in the Spiritual Court, but if it be *nient sa feme*, that is triable by a jury (d).

The fact of marriage is sometimes triable by jury.

*Obj.* This cannot be done without a third person, a priest, and she has not alleged, that the priest was there when she offered herself.

*Ans.* If I am bound to do an act to which a third person must necessarily concur, I must procure the third person at my peril; as it is held in *Lamb's case*, 5 Co. 23.

If I am bound to do an act in which a stranger must concur, I must procure his concurrence at my peril. Acc. 1 Rol. Ab. 452. *Worsley v. Wood*, 6 Term R. 710.

And being marriage hath been always held a good consideration to ground a contract upon, (as it appears by Hob. 10. Roll. 19. Moor, 605. Hob. 116. Hutton, 17. 1 Roll. 22), these three Judges concluded, that judgment ought to be given for the plaintiff. 1 Roll. 470.

*Vaughan*, Ch. Just. argued to the contrary; and he took three exceptions to the declaration; and first he observed, that where the plaintiff lies under a suspicion of being faulty, he ought always to allege in his declaration that \*he is clear and innocent, &c. as if a man brings an action for calling him "Thief" or "perjured," &c. the plaintiff always alleges that he was of good reputation and behaviour, &c. (e) and therefore here,

[ \* 97 ]

1st, She ought to have alleged that this marriage was lawful; because every marriage lies under a general suspicion of being unlawful, and therefore banns are always to be published.

2dly, She says, she was *parata et obtulit se*, and does not say, *infra duas septimanas*.

*Vid. post*, p. 347, S. C.

3dly, When one is to do an act, and avers that he was ready to do it, he ought to shew that he was ready to do it as it may be done; and here a priest is requisite, and she doth not say *quod obtulit se* in the presence of a parson.

*Sed vid.* 1 Ld. Ray: 386.

His reasons were these:

1. It is a promise to do an act that is *prima facie* unlawful, for she was to take him within two weeks, and banns cannot be published in that time. *Sed quære de cest reason*.

2. When the promise is to marry, it is intended either absolutely, let there be what impediment there will, and then it is unlawful, for it might be a promise from the son to the mother, &c. or else it is to be taken conditionally, provided there be no impediment; and if so, then the impediment being a thing which may be alleged by way of excuse by the defendant, and it being a thing that this Court cannot take conusance of, it ought not to be sued for here, but in the Spiritual Court (f); as 27 H. 8, 14, resolved an action would not lie for calling a man "heretic," because if the defendant justified, it could not be tried in a Temporal Court (1).

(1) *Post*, C. 311.

(d) Cro. Jac. 102. 2 Rol. Ab. 585. *Ilderton v. Ilderton*, 2 H. Black. 145.

Rule B. R. 1654. xiii.

(e) *Sed quære*, whether the allegation be necessary? 1 Lev. 297. 2 Wilson, 147.

(f) A disability may be given in evidence under the general issue. *Harrison v. Cage*, 1 Ld. Raym. 387.



3. By the canon law, the act of marriage, at the time of the marriage, ought to be free from any coercion, and if the minister know of any, he ought not to marry them; as if a man enter into a bond to marry such a one, this is not lawful; and it is all one here; for admitting that the action will lie, here is the fear of temporal damage (g).

A consideration is not requisite in a deed for a personal duty. Plow. 308. 3 Burr. 1671. 7 Term Rep.

[ \* 98 ]  
350, n. 2 Bl. Com. 446.

And he said, the old books did generally disallow of this consideration, and will be reconciled by this distinction; where such a contract is by deed it will be good, but not by the merit of the contract, but by the force of the deed; for a consideration is not requisite in a deed for a personal duty; and therefore in 22 Ass. pl. 70, (*vel.* 17), (which is but an opinion *in transitu*) it is said, upon a covenant to pay money in consideration of marriage, an action will lie; and that is true, if rightly understood, for covenant will not lie without a deed; and Fitzherbert in his \*Nat. Brev. being misled by this book, mistaking it, hath been the cause of all the late judgments.

(2) *Sed vid. ante*, note (b).

And whereas it hath been objected, that the party hath no remedy in the Ecclesiastical Court; he hath the same remedy as he hath for a legacy, which is to excommunicate the party till he make satisfaction (2).

(3) 5 Mod. 412. 1 Salk. 24.

4. The promise of the plaintiff was to take the defendant to husband, and not to be ready to do it; and the thing being lawful and possible ought to have been averred to be done: if a third person will promise me 10*l.* if I will marry such a person; if I will have an action for the money, I must aver that I married accordingly. This promise amounts to no more than if I had promised to marry you at your request; and that without doubt had been *nudum pactum* (3); besides, this suit is for recompence, because one had performed, and the other had not, and so performance ought to be averred; but here the plaintiff was to do a thing, and asks a recompence before it is done.

Co. Lit. 79 b. 1 Bl. Com. 436.

And marriage is a thing so reciprocal, that there is nothing in the law like it; as if a man of full age marries one within age; at her full age he may disagree as well as she (h); so that this promise is no more than in consideration that you will lie with me, I will lie with you; or that if you will read such a deed in my hearing, I will hear it read; or if you will touch my hand, I will touch yours; which promises would have been absolutely void. *Sed per les opinions des autres 3 justices judgment fuit done pro querente* (i).

(g) 2 Vern. 215. 4 Burr. 2225. See the copious notes on this subject in Fonbl. Treat. of Eq. B. 1, c. 4, § 10.

(h) The contract of marriage is not void, but voidable only at the election of the infant. *Holt v. Clarencieux*, 2 Stra.

937. Harg. Co. Lit. 79 b. n. (2).

(i) *Vid. ante*, *Burrell v. Strong*, p. 65. The strong repugnance of C. J. Vaughan to the introduction of these actions has been frequently noticed; see 5 Mod. 155. 2 Stra. 938. &c.



## THE EARL OF LINCOLN'S CASE. —In C. B.

(C. 110.)

Semb. S. C. 3 Kebl. 152.

THE Earl of Lincoln declares, that his father was seised of a manor, to which this advowson was appendant, and presented, and the presentee died, and then his father died, and so says, that the manor descended to him, and so it belongs to him to present, &c. And to this the defendant demurred generally, and shewed for cause, because the plaintiff upon his own shewing hath no title to the advowson; for it being a chattel vested, it ought to go to the executors, and not to the heir; and so is F. N. B. 33. 1 Roll. 857 (a).

If one, seised of a manor to which an advowson is appendant, dies during a vacancy, the next presentation shall go to the executor, and not to the heir.

(a) Acc. Wentworth, Executors, p. 54, 78, ed. 1668. Bac. Ab. Executors, (H) 3. Where the same person is both patron and parson, the heir has a preferable title to present on his death. *Holt v. Bishop of Winchester*, 3 Lev. 47.

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## CERTIORARI TO THE CINQUE PORT OF WINCHELSEY.—In B. R. (C. 111.)

S. C. 2 Lev. 86. 3 Kebl. 154. and see 3 Keb. 324. T. Raym. 448.

A CERTIORARI was sent to Winchelsey for a record that they had made, whereby they had taxed the foreign; and they return, that they had made taxes for the foreign for the preservation of the corporation, and to raise ammunition to provide against invasion of foreigners; and shewed that Winchelsey was one of the five ports, *ubi breve Domini Regis non currit*.

Semb. When a certiorari is directed to a cinque port, to remove orders made by the corporation for taxing the lands of the foreign, a return alleging the privileges of the cinque port must shew some jurisdiction to which the aggrieved party may appeal.

*Wilmot* moved that this was not a good return; for he said, that a certiorari was the king's writ, and a mandatory writ, and that the County Palatines nor Cinque Ports were not so privileged, but that this writ must be obeyed by them; and for that he cited Cro. Car. 265. 1 Ed. 3, 49. 21 Ed. 4, 10. 14 H. 7, 20. 34 H. 6, 15. 15 H. 5. Fitz. Quare Impedit, 165. Nat. Brev. 245. 30 H. 6, 6 (a).

If they would take away the jurisdiction of this Court, they ought to shew where the party might have right. Co. Entries, 298. The case of *Cole-Harbour*. Nat. Brev. 49.

Acc. Cowp. 172. 6 East, 583.

*Bruer* argued, that a certiorari would not lie in this case; and he confessed, that in matters that concern the king's revenue, or in matters criminal, or where the liberty of a subject is concerned, that a certiorari would lie; but he said this case was none of those, and that they had always liberty of taxing the foreign for the defence of the corporation in time of war, especially when there was any danger of foreign invasion.

In matters concerning the king's revenue, or matters criminal, or where the liberty of the subject is concerned, a certiorari lies to the cinque ports (b).

*Hale*, Ch. J.—You ought to set forth, that there was some jurisdiction to which the party might appeal if he were injured (1), otherwise the corporation will be party and judges and all, and they will tax the lands of the foreign to what

(1) 2 Inst. 557.

(a) Styl. Prac. Reg. 656, 4th edit. 2 Hawk. c. 27, § 24. Ante, p. 12, and post, p. 147. 2 Burr. 855-6.

(b) Vid. 1 Lilly, Prac. Reg. 364.

(2) 3 Keb. 154. value they please; and he said, there were three sorts of suits (2). 1. Between party and party, and there you must return that you have jurisdiction. 2dly, Matters of the crown; and 3dly, Matters of a middle nature, as where the king and his subjects are both concerned, as in this case. *Sed Curia advisare volunt* (c).

(c) See Hale de Portibus in Hargrave's Law Tracts, p. 112-3.

[ 100 ]  
( C. 112. )

ANONYMUS.—In B. R.

*Semb. S. C. R. v. Baker*, T. Raym. 219. 3 Keb. 75, 94, 106, 273.

Whether an information lies in the K. B. upon the statute 22 Car. 2, c. 12, for using more than five horses on the highway? *Post*, C. 509. C. 539. C. 604. 2 Hawk. c. 25, § 4. Id. c. 26, § 1 & 2. 2 Mod. 302. 4 Mod. 145. 1 Burr. 543. 2 Burr. 803, 832.

To carry too heavy loads on the highway is indictable at common law. *Post*, C. 114.

AN information was exhibited in the Crown-Office for going with above five horses, upon the late statute for highways: it was moved in arrest of judgment, that an information would not lie in this case. 1. Because here is nothing given to the king. But to that it was answered, that the penalty being divided into three parts, and one going to the repair of the highways, that the king was concerned in it. 2. It was objected, that it will not lie in this Court, because this was an offence that was not punishable before this statute; and in such cases, if the statute gives a particular way of recovery of the penalty, that ought to be pursued; and so this statute hath done; for here the officers may seize a horse, &c. as the statute directs; and for this was cited 10 Co. 56, Dr. Foster's case. 2 Co. 643. Plow. *Stradling's* case. Judge Twisden cited one *Egorly's* case (a), where it was ruled, that at the common law, if a party carried too great loads, he was indictable.

(a) *S. C.* 3 Sal. 183. And see Jenk. 284. Com. Dig. Chemin. A. 3. March. 135.

( C. 113. )

FORTH v. WALKER.—In C. B.

*S. C.* 3 Keb. 160, 181.

Pleading in debt on bail bond. *Vid.* 3 B. Moo. 214. (1) See the report in Keble.

DEBT upon an obligation. The condition was, that if the defendant (who was arrested upon a *Latitat*) do appear such a day *ad respondendum* (1) J. S. *secundum consuetudinem Curiae*, &c. That then it should be void.

The defendant pleads that there was no such custom, &c., and the plaintiff demurred.

1 Rol. Ab. 873. 1 Sal. 7. Willes, 9.

Serjt. Turner, *pro quer'*, argued, that the plaintiff ought to have judgment; for that the defendant shall be estopped to say there is no such custom, contrary to the condition of the bond; and compared it to the case in 18 Ed. 4, 4. The condition was to pay money due upon another obligation; the defendant cannot say there was no such obligation; and in 2 Co. 33, the difference is taken between a general and a particular matter. *Vide* Pop. 114, 115.

Co. Lit. 206 a. 3 Lev. 74-5.

2. Admitting there be no such custom, yet the plaintiff ought to have judgment; for if there be no such custom, then the condition is impossible, and so the obligation will

be single, for then it will be impossible he should appear according to the custom. Perk. 142. 4 H. 7, 4. 2 Ed. 4, 2. Bro. Oblig. 45. 1 Inst. 206. But perhaps it may be objected, that \* the plaintiff by his demurrer hath confessed the plea of the defendant, that there was no such custom. *Ans.* If there be none, the obligation is single; but a demurrer here will not be a confession of it, because it is not well pleaded. 6 Term Rep. 719.

*Obj.* The bond is made in another form than the statute doth direct.

*Ans.* If the defendant would take advantage of that, he must plead it, for it is but a private act (a). 4 Co. 76. Dy. 119. Plow. 65. Besides, every variation from the statute shall not avoid the bond, as it is resolved in 10 Co. *Beufage's* case. *Curia advisare volent.* [*Vide post*, C. 123].

In debt on a bail bond the stat. 23 H. 6, must be pleaded. 5 Co. 119. Hob. 72. But see 4 M. & S. 338. 2 Term R. 569.

(a) That it is a public act, see *Samuel v. Evans*, 2 Term Rep. 569, where it is also decided that if it appears upon the declaration that the bond is void by the statute, judgment may be arrested after a verdict upon *non est factum*. *Vid.* 1 Willms. Saunders, p. 161, n. (1); and *post*, C. 406, p. 327.

### BISHOP OF LINCOLN v. ATWOOD.

( C. 114. )

S. C. Cart. 204. 3 Keb. 161.

IN trespass for taking three tuns of hay, the defendant justifies, for that he was meadow-reeve chosen at a leet *secundum consuetudinem manerii*, and that time out of mind the meadow-reeve had used to collect the bishop's rents, and had used to have for his pains, out of the meadow *in quo*, &c., as much hay as he could draw upon an ordinary cart; and so justifies for his load of hay, and doth not aver that it was upon an ordinary cart: And the Court seemed to incline, that the plea was not good, because he had not applied his case to the custom. And it was also urged by *Nudigate*, that the Court might take notice that this was not an ordinary load; and he cited *Egorly's* case, the carrier of Oxford, who was informed against for carrying 4000 weight, and was found guilty, and fined. *Sed adjournatur.*

A justification under a custom must contain averments to shew that the defendant's case is within the custom. 2 Bulstr. 201.

*Quære*, whether the Court will take notice of an ordinary cart load? *Ante*, C. 112, n. (a).

### LEAVES v. COX.

( C. 115. )

S. C. 3 Keb. 162.

DEBT upon an obligation of 20*l.* against the defendant as administrator of Benjamin Cole: The defendant pleads that the intestate was bound to him in 500*l.* and that he had but 20*l.* assets, which he reserves towards satisfaction of that bond of 500*l.*

The plaintiff replies, That that bond was for performance of covenants, and that no covenant was broken.

The defendant rejoins, that by a covenant he was to pay him 130*l.* for the sale of wood, and that 40*l.* of that was not paid.

The plaintiff surrejoins, that the covenant was broken only as to that 40*l.* and the interest of it, which was 17*s.*, \* and that that was satisfied; and that he keeps the bond a-foot

Departure.

[ \* 102 ]

fraudulently to deceive the plaintiff. And it was adjudged *per Curiam* to be a departure.

( C. 116. )

WARKEHOUSE v. SYMONDS.

*Semb. S. C.* under different names, *post*, C. 141. Cart. 221. 3 Keb. 162, 418, 455, 460, 506, 577, 607.

A rejoinder by executor that "he did not keep the said judgments on foot to defraud the plaintiff," omitting "nor any of them," is bad (a).

DEBT against an executor, who pleads several judgments, *ultra quod*, &c. The plaintiff replies, that he kept those judgments a-foot to defraud him. The defendant rejoins, that he did not keep the said judgments on foot to defraud him, but does not say them, nor any of them: and it is possible he may defraud the plaintiff by keeping one of them a-foot; *et semble al Court q' est male; sed adjournatur*.

(a) See *post*, p. 121. *Ante*, p. 28.

( C. 117. )

SHAW v. STORTON.—In B. R.

*S. C.* 2 Lev. 86. 3 Keb. 163.

A debt on simple contract is *bona notabilia* in the diocese where the debtor is (a).

(1) *S. C.* 8 Co. 135.

If there be *bona notabilia* in England and Ireland, there must be two administrations. So if in the provinces of York and Canterbury: *aliter*, if the goods be in one English province, and in France or the East Indies (b).

THE sole question was, whether a debt upon a contract should be assets where the creditor was, or whether it should follow the debtor. And it was objected from 1 Rolle, 909, and from Noy, 54, that it should follow the creditor. But it was adjudged in this case contrary *per Curiam*, according to the case of *Byron and Byron*, Cro. Eliz. 472; and my Lord Chief Justice cited one *Needham's* case (1), 7 Jac. adjudged accordingly: and it was said by the Chief Justice, that if a man hath goods in the province of York and the province of Canterbury, there must be two administrations granted; and so there must if the intestate hath goods in England, and goods in Ireland, because there are two superior jurisdictions in both cases; for as there is an archbishop of Canterbury and of York, so there is of Dublin: but if a man hath goods in one of these provinces in England, and more goods in France, or in the East Indies, there one administration shall serve the turn, because there is no jurisdiction that we take notice of.

(a) Acc. Wentw. Executors, p. 47. (b) *Vid. post*, C. 273. 1 Salk. 39. *Yeoman v. Bradshaw*, 3 Salk. 70. 12 1 Rol. Ab. 908, l. 29. 11 Viner, 76. Mod. 107.

( C. 118. )

DUGAR v. NORTON.

If guardian and ward join in a lease, it is the lease of the guardian till the ward is 14 years

IF a lease be made by the guardian, and the ward under 14 years of age, it is the lease of the guardian, and not of the ward; but after fourteen, it is the lease of the ward, and not of the guardian (a).  
old, and afterwards the lease of the ward.

(a) On leases by guardians, see Bac. v. *Hodgson*, 2 Wils. 129, 135. *Shaw v. Ab. Leases.* (1) 9. 14 Viner, 182. *Roe Shaw*, Vern. & Scriven's Rep. 607.

## BRUMFIELD v. TEA.

( C. 119. )

S. C. 2 Lev. 87. 3 Keb. 163.

TRESPASS for distraining his cattle, and impounding them till he paid a certain sum of money for them. The defendant justified for a drift, &c. The question was, whether the custom of drift would empower him to distress? and it was said in this case, that he that justifies a distress for an amercement, must allege a custom to distress; and so they usually do for toll, though there is an opinion that they need not: and the Lord Chief Justice cited the case of *Teukesbury* (1), where they distrained for the repair of a bridge, and did not allege a custom to distress; and yet it was held good enough, because the party had no other remedy. *Sed principalis casus adjournatur* (a).

Whether distress be incident to a custom of drift?  
1 Sal. 175. Cro. El. 748.

(1) 1 Rol. 606.

(a) Judgment for the defendant, because "it is a thing of common right for the preservation of the common." S. C. 2 Lev. 87. See T. Ray. 204. 1 Ventr. 105. Com. Dig. Distress, A. 1. On *Drifts*, see Manwood, p. 127, 4th edit. 4 Inst. 309.

## COCKEIN v. LANE.

( C. 120. )

A MAN pleads a bargain and sale, and says that it was *debito modo irrotulat*, and does not say within six months. *Hale*, Chief Justice.—It hath been ruled to be bad in pleading, but in a special verdict it would be well enough, for there it shall be intended (a).

Pleading a bargain and sale "*debito modo irrotulat*," without saying "within 6 months," bad. Plow. 105.

(a) The defect may be cured by the words *secundum formam statuti*." *Semb.* cognized in Com. Dig. Bargain and Sale, B. 12. Alleyn, 19. Carter, 221. See the precedent in 2 Saund. 11, re-

## LUCY v. LEVISTON.

( C. 121. )

S. C. 3 Kebl. 163. S. C. but not S. P. 1 Ventr. 175. 2 Lev. 26.

COVENANT for quiet enjoyment against all persons claiming under Sir Peter Vanlore; and shews that such a one did disturb him, *clamans titulum* under Sir Peter Vanlore; and the defendant demurred because he did not say *legalem titulum*; and for that the Court took this difference, that where a man makes a general covenant against all persons, there a breach of covenant shall not be alleged by a disturbance, unless it be by a lawful disturbance; but otherwise it is when the covenant is to enjoy quietly against a particular person, according to the difference taken in the case of *Tisdale* and *Essex*, in Hob. 34. And the Court said, generally in covenant it is sufficient to follow the words of the covenant (b).

A general covenant for quiet enjoyment against all persons shall only extend to lawful disturbances: *secus* of a covenant against a particular person (a).

Generally, in assigning a breach, it is 181 c. note.

sufficient to follow the words of the covenant. 9 Co. 60. Yelv. 30, 40. 2 Saund.

(a) *Post*, C. 612, 146, 163. 1 Stra. 400. 5 Maul. & Sel. 374. 1 Barn. & Cres. 29. 2 Dowl. & Ryl. 133, S. C. 6 Viner, 426.

(b) The breach may be assigned either in the words of the covenant, or according to the sense and substance of it. Com. Dig. Pleader, C. 45, 46.

( C. 122. )

ANONYMUS.—In B. R.

*Semb. S. C. Hanslip v. Coater, 2 Lev. 87. 3 Keb. 164. 1 Ventr. 243.*

An *indebitatus* count for goods sold, in an inferior Court, must allege both the sale and the *assumpsit* to have been within the jurisdiction of that Court (a). Hale C. J. and *Wild, J. dubitant.*

In an *indebitatus* count the *indebitatus* is inducement, and the *assumpsit* the ground of the action.

*Vid. Lawes's Treatise on Assumpsit, p. 423, 429.* It is enough if the origin of the debt be alleged generally, so that it may appear to be a simple contract (b). *Post, C. 177, 438, 451. Hob. 5.*

The *venire* in an inferior Court ran thus: "*Per quos veritas melius scire poterit,*" instead of "*sciri:*" held

*Indebitatus assumpsit* was brought in the Court of Coventry, and alleges that the defendant was indebted to him for goods sold; and being so indebted did, &c. assume *infra jurisdictionem Curiae*; and upon *non assumpsit* a verdict was given for the plaintiff; and a writ of error was brought to reverse this judgment, because he doth not say that the goods were sold *infra jurisdictionem Curiae*. And the Lord Chief Justice *Hale* was of opinion that it was good enough; for the *indebitatus* is but the inducement to the action, but the *assumpsit* is the ground of it; for this is not an action of debt, but an action on the case; and the alleging the *indebitatus* is but to shew that it is not a debt upon a judgment, nor an obligation, nor a rent; so that if he had said *indebitatus pro vinis* generally, it would have been good enough. But *Twisden*, and the practisers of the bar affirmed, that for these ten years last past it had been the constant practice to reverse judgments in inferior Courts for that fault; for in an inferior jurisdiction nothing shall be intended within it but what is expressly alleged. *Hale* said, if the practice of late had been so, he should very hardly be induced to alter it, for he did not love *cedere decisis*; but he said he had attended this Court 30 years, and never heard it ruled so: and *Wylde* said, he had attended 20 years here, and never knew it: and *Hale* took this difference, that if he had said for wares sold at such a place, he ought to have said it was within the jurisdiction of the Court; but if no place appear, and the *assumpsit* be alleged within the jurisdiction of the Court, it is well enough; but he said he should be unwilling to recede from the late precedents; whereupon he wished them to name any other error: and the counsel said, that in the *venire facias* there was *per quos veritas melius scire poterit*, instead of *sciri*, and all agreed that was bad; but *scir'* with a dash was well enough. *Advisare volunt.*

bad on error. *Secus*, if it had been *scir'* with a dash (c).

(a) *Vide post, p. 214, 316, 317, 321,* and the cases cited in *Peacock v. Bell, 1 Saund. 74, note (1). Waldock v. Cooper, 2 Wils. 16. Trevor v. Wall, 1 Term Rep. 151. Dunn v. Crump, 3 Brod. & Bing. 309.*

(b) *Vid. 2 Salk. 446. 2 Saund. 350, note (2) in the case of Peters v. Opie.*

Another reason is given in *Cro. Jac. 642.* The cause of the debt may be omitted, where a special custom sanctions such a general form of declaring. *Story v. Atkins, 2 Stra. 720, arguendo:* and see *1 Saund. 68, n. (2).*

(c) *Acc. post, C. 388, 320. 2 Lev. 83. 1 Ventr. 241.*

[ \* 105 ]

( C. 123. )

MILDMAY v. COX.

*S. C. 1 Ventr. 233. 3 Keb. 111, 164. T. Raym. 220.*

The defendant was arrested upon a *latitat*, with an *ac etiam*

THE defendant was arrested upon a *latitat*, and gave bond to the sheriff for his appearance *ad respondendum querent' in placito debiti:* and the question was, whether this bond



was void by the statute of 23 H. 6, 10, because it was made for another thing than was contained in the writ; for the writ is only *de placito transgr'*, and the *ac etiam billæ* is only to give the defendant notice, that the plaintiff will declare against him for it when he appears, and the bill doth not come in till after appearance. And *Hale* said, if their writs should be *ad respondendum in placito debiti*, the Common Pleas might justly quarrel with them for incroaching upon their jurisdiction: and they all held the bond to be void, because it varied clearly from the writ (a).

in debt: the bail bond required his appearance "to answer the plaintiff in a plea of debt." Held that the bond was void, because it varied from the writ. Com. Dig. Plead. 2 W. 25. *Ante*, C. 113.

(a) But it is now held that a variance in the description of the plea does not avoid the bond. *Davenport v. Parker*, Fortesc. 368. *Owen v. Nail*, 6 Term Rep. 702, 705, note (a). The statement of the *respondendum* in the plea is mere surplusage. *Ibid.* 2 Lev. 123.

### TRUMBALL v. BARKER.

(C. 124.)

DEBT upon an obligation for 400*l.* and the obligation was *quatuor centum li.* and the declaration was *quadringent' li.* The defendant pleaded a variance; but it was adjudged to be well enough, and to be the same thing.

Variance. Hob. 19, 119. 1 Ld. Ray. 335.

### RANDALL v. RICHILL.—In B. R.

(C. 125.)

S. C. 1 Mod. 96. 2 Lev. 87. 3 Keb. 165, 214.

THE question was, whether a rent-charge newly created, issuing out of gavelkind land, should descend as the land doth to all the sons, or to the eldest only? And the Court were of opinion that it should, notwithstanding there are some opinions in the books to the contrary. 21 H. 6, 1. 26 H. 8, 4. And they said that it is not because the land is gavelkind that it descends to all the sons (1), or that the wife shall be endowed of a moiety, or that the land should not be forfeited by attainder; but these were particular customs that do attend for the most part gavelkind land: but they said, if land be disgavelled by act of parliament, these customs are not taken away; and they all agreed that a use would descend as the land doth (2): but because Serj. *Hard.* had studied the point, they gave him a day the next Term to hear what he could say to the \* contrary. And the main reason in the principal case seemed to be, because a rent issues out of the land, and goes to the party, by way of recompence for it. *Post*, p. 345. [S. C. continued.]

A rent-charge newly created, issuing out of gavelkind land, descends according to the custom of gavelkind.

(1) *Sed vid.* *Brooke v. Thomson*, ante, p. 48.

(2) *Post*, p. 346.

[ \* 106 ]

### WELCH v. BELL.

(C. 126.)

S. C. 2 Lev. 73. T. Ray. 218. 3 Keb. 105, 128, 165, 198, 222.

A WRIT of error was brought, and infancy alleged for cause, and concludes *et hoc parat' est verificare prout Curia considerabit.* The question was, whether he had well concluded; because infancy being a matter of fact, he seems to put properly con-

An assignment for error, that an infant appeared by attorney, is properly con-

cluded by *hoc paratus est verificare prout Curia considerabit.*

it upon trial by the Court. *Hale*.—It is well enough, for if he had concluded *et hoc paratus est verificare*, it had been good without doubt; and it is common to add *prout*, &c. and the &c. there implies the same that is here expressed; and the meaning of it is no more, but that he shall be ready to make it appear as the Court shall thing fit; and if he had pleaded *et hoc petit quod inquiratur per patriam*, it had been bad; for perhaps the party might have a release of errors to plead, and then he had concluded him to plead it. *Vide* Yelv. 58. 1 Bulst. 37 (a).

(a) Carth. 367. *Sheepshanks v. Lucas*, 1 Burr. 410. 2 Saund. 101 p. note, *ib.*

( C. 127. )

### TURLESTON v. RIVES.

*Semb.* S. C. under the name of *Dinedale (or Hinchman) v. Isles*, 2 Lev. 88. 1 Vent. 247. T. Ray. 224. 3 Keb. 166, 207.

After having made a lease at will, the lessor makes a parol lease for years to a third person to begin presently, with an agreement that the latter shall not enter until the rent has become due from the lessee at will. *Semb.* the lease for years is no determination of the lease at will. *Aliter*, if the lease for years had been in writing. *Per*

[ \* 107 ]  
*Hale*, C. J.

If the lessee at will sows the land before he has notice of the lease for years, he shall have the crop.

Words spoken by the lessor to his bailiff will not determine a lease at will, without notice to the lessee. Bargain and sale by lessor determines a lease at will, [*i. e.* if the lessee have notice. *Vid.* S. C. 3 Keb. 208. 1 Vent. 247.]

THERE was a lessee at will, and the lessor makes a lease for years to a third person, to begin presently, by parol, but agrees with him that he shall not enter till such a day, which was after the day that the rent was due from the lessee at will. The question was, whether or no this was a determination of the lease at will?

The matter was debated at the bench, but not argued. *Hale* seemed to incline, that the lease was not determined; for he said, it is at most but a determination by implication; and the lease being by parol, it possibly may be modified by such an agreement, so that it should not touch the lease at will; though if it had been in writing, such a proviso would have amounted but to a covenant. They all agreed, that if a lease at will were made the 25th of March, and then the lessor makes a lease for years the 26th to a stranger, and the 27th the lessee at will not having notice sows the land, that he shall have the crop. But *Hale* said, the great difficulty of this case would be, that if the lessee for years shall be said to have the reversion, how then can the first lessee be tenant at will to the lessor? [1 Roll. 852.]

If I have a tenant at will, and I say to my bailiff, "I do determine my will," this will not determine the lease, if the lessee hath not notice. 1 Inst. 55 b. 1 Roll. 860. But they all agreed, if the lessor had bargained and sold to another, that it had clearly determined the lease (a).

(a) This case is reported in the books with considerable variations: but it may perhaps be collected from them, that a lease for years will not determine a subsisting lease at will until the time of its commencement in point of interest, although it may commence from an earlier period in point of computation. A formal lease for years in writing, to com-

mence immediately, will have this effect although accompanied by a collateral covenant not to enter till a future time. 2 Lev. 88. But in the case of a parol or verbal letting, such an agreement will incorporate itself with the lease, and modify it in such a manner as to constitute a lease commencing in interest at the period appointed for entry.

## HOLLOWAY v. ———.

( C. 128. )

S. C. under the name of *Harlow v. Bradnax*, 2 Lev. 88. 3 Keb. 151, 166.

IN a replevin the defendant avows by virtue of a lease made by a jointress, rendering rent, and for that the rent was behind he avows *ut ballivus* of the feme, and doth not aver that she was living. And the plaintiff demurred, and shewed the insufficiency of the averment for cause. It was said, that *ut ballivus* after a general demurrer would have been an averment good enough; and if there had been no averment, after a verdict (b) it would be good; but it being here specially shewed for cause, it may be doubted. And *Hale* said he had known it, where the heir did (1) for a rent granted to his ancestor as *Aretro* to him, that this was a sufficient averment of the death of the ancestor; and this difference was taken between a justification and avowry, that in a justification it is sufficient that the party be alive at the time of the distress taken, but he cannot avow, unless the party be alive at the time of the avowry (c).

A conusance as bailiff of tenant for life, for rent in arrear, is a sufficient averment of the continuance of the life; at least upon general demurrer (a).

2 Lutw. 1226.

Com. Dig.

Pleader, C. 67.

Post, C. 140.

(1) *Quere*, "did avow?"

(a) Twisden and Wild held the conusance good even on special demurrer. 2 Lev. 88. S. C.

(b) See 21 Jac. 1, c. 13. 4 & 5 Ann. c. 16.

(c) The words in *aretro existent* are insisted upon as the healing words in the report of Levinz, and are recognized as such in Com. Dig. Pleader, C. 67, and by Serjeant Williams, in 1 Saund.

235 b. note. But the reports of Freeman and Keble agree in representing the defect of averment to have been supplied by the *conusance as bailiff*. If the tenant for life had died after the distress, the defendant must have *justified* instead of making conusance. See 3 Keb. 166. S. C. Bull. N. P. 54-5. Com. Dig. Pleader, 3 K. 12.

## HILL v. GOOD.—In C. B.

( C. 129. )

Continued from p. 73.

PROHIBITION for affinity. *Jones* argued, that a prohibition ought not to be granted; for although this was not expressly forbidden, it is in *æquali gradu* with some that are; and Sir Ed. Coke in 2 Inst. 683, enumerates this for one of the prohibited degrees; and in *Lev. xviii. v. 16*, "Thou shalt not uncover the nakedness of thy brother's wife," and this is in the same degree as that; for the husband's brother is no nearer to the wife, than the wife's sister is to the husband. And in Clement's Apostolical Constit. 19 Canon, there is a penalty of 5*l.* upon him that marries his wife's sister; and it is prohibited in the table of degrees allowed by the Church; and in the 99th Canon of King James; \* and it seems to be the judgment of the Parliament in 25 H. 8, 2, and 28 H. 8, 7; and in *Levit. xviii. v. 18*, it seems to be expressly forbidden; and for these reasons he desired that no prohibition might be granted.

[ \* 108 ]

But *Vaughan* answered, that as for the judgment of parliament in those statutes alleged, they were repealed; and as for the text in *Levit. xviii. v. 18*, it must be intended to take a sister in the lifetime of the wife (1); and as for the punishment in the Apostolical Constitutions, that rather

(1) *Ante*, p. 73.  
*Post*, p. 169.

fore notice, is to be intended, when the party lives in a foreign county, for there the book of 2 H. 4 is cited; and Trin. (1) Carter, 227. 21st of this king, the case of *Mellor and Overton*(1) is adjudged expressly in this point.

*Jones pro def'* argued, that it would be inconvenient and absurd, that the executor should be bound to take notice of an original, though it be in the same county, for these reasons:

1. The taking out of an original is the bare act of the plaintiff, and of such things the defendant is not bound to take notice. Hob. 58. And in *Camp and Smith's* case, in this Court the last Term, it was resolved, that whereas the defendant had promised to unload the goods of the plaintiff, &c. within fourteen days after his coming to Hull, that no action would lie, without notice given.

2. The law hath ordered a summons, and supposes that the party hath notice by the summons.

3. In cases that are penal, the law will always make a favourable construction in cases of forfeiture; as in the case of rent, a condition for default of payment to re-enter, the law says there must be a demand. 5 Co. 112. 3 Co. 64. The bargainee shall not take advantage of a condition before notice.

4. It is impossible the defendant can take notice of this original without notice; for the original is taken out of the Chancery at Westminster, and the defendant lives at York; and by this rule, if the defendant administered any goods the morrow after the original taken out, when it is impossible he could have notice, he should be charged; *et lex non cogit ad impossibile*.

(2) *Vid.* Sayer Rep. 800.

5. There is no record till the writ be returned. 7 Co. 30(2). A suit shall not be said to be depending, so as not to be discontinued by the death of the king, within the statute of 1 Ed. 6, 7.

[ \* 112 ] And this Court is not bound to take notice of a record of another Term, nor of a private act of parliament, unless it be pleaded, which is a record of the highest nature; and in the King's Bench and Exchequer the plea is, that he had fully administered *ante exhibitionem billæ*, and that \*implies notice; for the bill is not exhibited till the party is *in custodia Mareschalli*.

The authorities are, 2 And. 159. Fitz. Executor, 39. Moor, 678, 37, pl. 122.

And as to the case put by *Sise*, of buying of goods after an execution awarded, it is no more than buying of one who had no title to sell them; and as to the case of 2 H. 4, that book does not come up to this case but by implication; for there he pleads commorancy in another county, which is safe, when it may be truly pleaded; but it doth not therefore follow that the party may not plead the same plea as to notice, though Herne's Pl. 302. it be in the same county; and that case is cited in Bro. Notice, 16. Administrator, 52. Executor, 43. Assets, 4. and in some the commorancy is mentioned, in some not.

*Vaughan* said, as to the case of *Mellor* and *Overton*, *Quod inconsultò factum est consultò debet revocari*. And he said, there can be no difference at all as to notice, whether the party be in the same, or in another county; only when he is in another county, then it is impossible that the sheriff could summons him to give him notice. *Et adjournatur*.

*Vid. ante*, C. 69, note.

GARDNER v. BLOXAM.

( C. 132. )

*S. C. Child v. Bloxam*, 3 Keb. 175.

DEBT for rent. The defendant pleads *Nil debet*; and so issue joined; and at the day of Nisi Prius the defendant pleads *quod puis darrein continuance* the plaintiff released to him, and doth not name any place where he released, so as no issue could be taken; and to this the plaintiff demurred. And it was adjudged a fault incurable. For pleas *puis darrein continuance*, *Vide* 2 Cro. 261. Yelv. 121. Cro. Eliz. 49. Dy. 361 (a).

Plea of release *puis darrein continuance* must name a place where it was made.

(a) A day and place must be stated. Doctr. Placitandi, p. 59. 5 Mod. 12. Buller Ni. Pri. 309.

WILSON v. ROBINSON.—In B. R.

( C. 133. )

*S. C.* 2 Lev. 91. 1 Mod. 100. 3 Keb. 180, 245.

A MAN devises all his tenant-right estate. *Semble, per Curiam*, that it passes a fee simple. And so, *per Twisden*,—If he devises all his estate, it shall be taken to pass all in respect of estate, as of lands; but the difficulty in this case was, because he devised all his tenant-right estate together with his lands in B. and C.; and for the lands in B. and C. it can pass them but for life; and it will, (*per Hale*) be hard to make the same words pass a fee-simple \*as to part, and an estate for life only as to the other. *Et adjournatur* (a).

A devise of "all the devisor's tenant-right estate" passes a fee; although followed by a devise of "his lands in B. & C." which passes [ \* 113 ] only a life estate.

(a) 3 Mod. 46. Skin. 194. On the operation of the word *estate*, see *Barry v. Edgeworth*, 2 P. Willms. 523, and Cox's note, *ibid.* *Holdfast v. Martin*, 1 Term Rep. 411. *Chichester v. Chichester*, 4 Taunt. 176.

ANONYMUS.

( C. 134. )

*Semble S. C.* under the name of *Horton v. Wilson*, 3 Keb. 203. 1 Mod. 167.

PROHIBITION was moved for to the Court of Chester, where a proctor had exhibited his libel for his fees. And Serjt. *Goodfellow*, being to shew cause why a prohibition should not go, cited Nat. Brev. 41, where it is said, if a man doth acknowledge himself to owe to another in the Spiritual Court 10*l.* for matrimony, or testament, he may sue there for it;

Whether a prohibition lies, where a proctor sues for his fees in the Spiritual Court (a)? 1 Bl. Com. 90.

(a) It is now settled that the fees of chancellors, registers, proctors, parish clerks, &c. who are temporal officers, must be recovered at common law; and an *indebitatus assumpsit* is the usual form of action. (See 4 Mod. 254. 5 *Id.* 238. 10 *Id.* 261. 12 *Id.* 583. 1 Salk. 333. 2 Stra. 1108. Bunbury, 170. Dougl. 629. Bac. Abr. Fees, (D). Viner, Fees, C. 2. H. 2 Stark. 443).

and so 12 H. 7, 23, 24. If 10*l.* be awarded for costs there, they may sue for it there; and he said, that the Temporal Courts cannot know their fees, and so they are most properly suable for there. But to that it was answered, that if an information for extortion be exhibited, there the Temporal Court shall take conusance what their fees are; and so it may as well here; and this is a temporal contract, to pay him his fees, and what he should lay out. And *Robinson* said, a prohibition was lately granted to Sir *Edw. Lake*, (Chancellor of Lincoln) upon a libel exhibited by an advocate for his fees, and 20*s.* laid out to Serjeant *Dallison*. *Vaughan*, Chief Justice, argued strongly, that no prohibition ought to go. *Sed alii justiciarii dubitaverunt; ergo advisare volunt.* [S. C. post, p. 122].

( C. 135. )

ASHENDEN v. CLAPHAM.

S. C. 3 Kebl. 176.

In debt upon a bill obligatory to repay money on demand, no special request is necessary.

*Ante*, p. 24. *Post*, p. 439, C. 595.

(1) Cro. Jac. 183, 523.  
1 Stra. 89.

DEBT upon a bill obligatory, *scil'*, "Borrowed of — 10*l.*, which I promise to pay upon demand;" the plaintiff says, *Quod licet sæpius requisitus* he had not paid it, but doth not lay any actual demand; and verdict being for the plaintiff, *Baldwin* moved in arrest of judgment, because no particular request in time and place is averred; and cited the case of *Browne v. Dunnery*, Hob. 208. But, *per Curiam*, a request is not here necessary, it being for the payment of a debt, and between the parties; but if it had been upon a penalty, or a promise by a stranger (1), or for some collateral matter, there a request must be laid; but here it appears that a debt was due, and it being for the payment of money by the debtor, although it be said *upon demand*, yet the bringing of the action is a sufficient demand. *Vide* Cro. Car. 384. Latch. 209. Cro. Eliz. 548, 721 (a).

(a) "Where a man engages to pay upon demand what is to be considered his own debt, he is liable to be sued upon that engagement without any previous demand; and a tender or readiness to pay must come by way of defence from the defendant; but if he engage to pay upon demand what was not his debt, what he is under no obligation to pay, what but for such engagement he would never be liable to pay to any one, a demand is essential and part of the plaintiff's title." *Per* Bayley, J. in *Rowe v. Young*, 2 Brod. & Bing. 231-2; and see *post*, p. 439, C. 595; p. 462, C. 631. In the principal case the objection was taken after verdict, and in *Bach v. Owen*, 5 Term Rep. 409, upon general demurrer.

But as *licet* is a sufficient averment, (*ante*, p. 6,) a general request only wants an allegation of time and place to convert it into a special one; and the omission of these is no longer available except on special demurrer. *Bowdell v. Parsons*, 10 East, 359, 365. On the necessity of demand before action, see Com. Dig. Pleader, C. 62, 70, 71, 72. Bac. Ab. Obligation, (F). 6. 1 Stra. 88. 1 Bos. & Pull. 58, 60. 3 Bos. & Pull. 434. 1 Saund. 33 a. n. (2). When the action is on a penal bond with condition to pay money on demand, a special demand is necessary, see (besides the *dictum* in the principal case), *Carter v. Ring*, 3 Camp. 459. *Winter v. Mauseley*, 2 Barn. & Ald. 802.



## WILSON v. DOVE.

( C. 136. )

S. C. 3 Kebl. 183, 393, 424. 2 Lev. 125. [Affirmed on error].

THE plaintiff declares, that whereas the defendant was indebted to the plaintiff 3*l.* for interest upon an obligation, the defendant, in consideration the plaintiff would deliver up the said obligation, did promise that he would pay the said 3*l.* to one William Ayres for the use of the plaintiff, in case he did not make it appear to, and satisfy the said William Ayres, that he had paid the said 3*l.* before; and avers that he did deliver up the obligation, &c.

The defendant pleads that he did pay the money, and give notice of it to William Ayres, and did make it appear to him that the money was paid. To this the plaintiff demurred, and shewed for cause, that this plea amounted but to the general issue. *Nudigate pro quer'*. — If an *assumpsit* be brought for the payment of money, and the money be paid before the action brought, the defendant may plead *non assumpsit*, and give it in evidence (a).

But to that the Court answered, that here is a collateral matter, besides the payment of the money, and that is the making it appear to William Ayres; and the action here is not grounded upon the non-payment of the money, but upon the not making it appear; and so as to that point the plea was well enough.

2. *Obj.* was, that the defendant hath pleaded that he made it appear; but doth not say how he made it appear; but only says *constare fecit*.

*Baldwin pro def'* said, — They might make it appear in the same action. But to that the Court answered, that could not be, as this case is; for the difference is, when a man promises to make a thing appear generally, there he may make it appear in the action; for it will be intended to make it appear to the Judges before whom it shall be tried; but when it is to make it appear to a particular person, there it must be by some other way, as by proving of it paid by a witness, or by an acquittance under his hand, &c. And so is the case of *Gold v. Death*, Hob. 93. 2 Cro. 488. And then he ought to have alleged that he had made it appear; and here he says only *constare fecit*. which is too general, for no issue can be taken upon it: And *per Vaughan*. — If he had said he had made it appear by telling of him so, that had not been good, for that had appeared to the Court to be no making it appear; but if he had said he had made \*it appear to W. A., and he had been satisfied, it might have been well enough: and they compared it to a discharge which a man pleads; he must shew what kind of discharge it was, that the Court may judge of it: But *per Atkins*. — That is not alike, for a discharge is a legal act, but making it appear is a matter of fact.

The plaintiff declared on a promise by the defendant to pay 3*l.* to A. B. for the plaintiff's use, if he did not make it appear to and satisfy the said A. B., that he had paid it before. A plea that the defendant "did make it appear to A. B., &c." held bad for not shewing how. Held also that the plea would have been cured by alleging that A. B. had been in fact satisfied.

A promise to make a thing appear generally, shall be intended of proof upon the trial. *Aliter*, of a promise to make it appear to a particular person. *Ante*, *Layworthy v. Chichester*, p. 53. *Post*, *Amy v. Andrews*, p. 133.

[ \* 115 ]

He who pleads a discharge must shew what kind of discharge it was. *Doct. Plac.* 58, 59, 60, 63.

(a) As to the plea of payment, *vid.* 1 Salk. 394. Bull. N. P. 152. 5 Barn. & Ald. 886.

The defendant was to do two things, to make it appear to W. A. and to satisfy him; so that if he had set forth how he had made it appear, so that it had been reasonable for W. A. to have been satisfied therewith; or if upon this general allegation he had alleged that he had been satisfied; it might have been well enough; but here it being generally alleged that he did make it appear, and not shewing how, nor that the party was satisfied therewith, *per Vaughan, Windham, and Ellis, (Atkins e contra)* judgment was given for the plaintiff.

(1) Com. Dig.  
Action upon as-  
sumpsit, F. 4.  
Delivery up of a  
bond is a suffi-  
cient consider-  
ation. 1 Sid. 31.  
Hob. 4, 5.

*Note; Vaughan* made a *quære*, whether the *assumpsit* being for interest money, was good (1). *Vide* 2 Rolle, 782, No. 30. 1 Rolle, 18. Cro. Car. 273. But however, here was another good consideration, viz. the delivery up of the bond.

( C. 137. ) THOMAS v. SALTMARSH [*qu. SORRELL?*—In Cam. Scac.

Continued from p. 92.

THE second Saturday in this Term, Baron *Littleton* and Justice *Wylde* argued, and they both held in all three points with Justice *Atkins*, viz.

1. That this patent was good in its creation.
2. That it did not determine by the death of King James.
3. That it was saved by the proviso in the 12th of this king.

See Littleton's  
arg. in 3 Keb.  
184.

See Wylde's  
argument,  
3 Keb. 185.

*Littleton's* argument was much to the same effect as those that argued before.

*Wylde* said much what was said before; and he said here were three very great things concerned in this case, to all which the Judges ought to have great regard.

1. The king's revenue.
2. The king's power of dispensing with acts of parliament.
3. The subject's liberty.

*Ante*, p. 89.

[ \* 116 ]

Trade always  
favored.

*Ante*, p. 36.

And as to the first point, that the patent was good in its creation, he observed, that at the common law every man might set up a vintner, or else any other trade that he pleased; and that trade hath always been favoured, it \*being as necessary to the body politic as the circulation of blood is to a natural body, and therefore hath always been promoted by the law; and therefore in the case of the *Merchant Taylors*, put in 11 Co. 86, where a bye-law was made for the restraint of trade, it was adjudged void; from which observations he did infer,

Acts of parlia-  
ment in restraint  
of trade con-  
strued strictly.  
Grants to en-  
courage it ex-  
pounded large-  
ly. 3 Mod. 126.  
1 Barn. & Cress.  
193.

1. That all acts of parliament made for the restraint of trade ought to be taken strictly.

2. That all grants made to encourage it shall be expounded largely and beneficially.

*Obj.* This profession of the vintners hath been subject to inconveniences to the public, and therefore there have been several acts of parliament made for the restraint of it.

**Ans.** The best things are subject to be abused; we must not therefore take them away, but endeavour to amend them; and at the common law, although every man might set up a tavern, and may now set up an inn, yet if they are in such places, and are so managed, that they are nuisances to the public, they may be put down; and they do now frequently in London, upon such occasions, pull down their signs. 1 Salk. 45.  
1 Hawk. c. 78.

**Obj.** That use is in London by custom.

**Ans.** It is such a custom as is warranted by the common law: besides, the king hath made a justice of peace and sheriff judges who are fit to set up, and why shall not the king judge himself? here is also *necessitas et utilitas pensat'*, according to the description of a dispensation, 11 Co. 88. 1. In relation to the vintners. 2. In relation to the navy; for by the statute of 5 Eliz. no wine is to be imported but in our own vessels.

**Obj.** This statute concerns the *bonum publicum*, and so the king cannot dispense with it.

**Ans.** The king may dispense with the statutes that are made *pro bono publico*, for all statutes generally are made *pro bono publico*; but where the dispensation doth take away the interest of the subject, there it is not good. Stat. 2 H. 6, 7. That a man shall be a sheriff but for one year, is made *pro bono publico*, and yet the king may dispense with it (1); for at this day the sheriff of Westmorland hath it by inheritance (2). Ante, p. 86, 91.  
Post, p. 138.

Statute of Mortmain was *pro bono publico*, yet, N. B. 223, the king may dispense with it. 24 H. 6, concerning the transportation of wool, the king dispensed with it. 4 H. 7, 9, statute for bringing in wines in English vessels, the king dispensed with it, as appears 14 H. 8, 54.

\* And the statutes of transportation of wool are of as great concern to the public as any, and yet 2 R. 3, 12, the case of the city of *Waterford*, the king dispensed with it, notwithstanding the great esteem set upon that trade, as appears by the recital in the statute of 27 H. 6, 2. 28 H. 6, 9. 14 H. 6, 2. 4 H. 6, 5.

**Obj.** This dispensation is of such an extent in time, place, and persons, that it doth in a great measure repeal the statute.

**Ans.** 1st. This patent is to be construed as to this first point, as though it had been questioned immediately upon the creation of it, and then it extended only to those that were of the corporation of vintners.

2. If it be abused afterwards, this is good reason for the king to sue out a *sci' fa'* and repeal it; but this doth not make it void in its creation, because it is subject to abuse.

3. This is not like the case of a monopoly; for here are no negative words in it that none else shall sell wine, &c.

**Obj.** This is a delegation of the king's power, to enable them, &c. to licence whom they please to sell wine without licence.

A dispensation amounting to a total repeal of a statute, is bad. Vaugh. 355. Harg. Co. Lit. 120 a. n. (4).

(1) *Sed vid. ante*, p. 87, in margin.  
(2) *Vid.* 1 Bl. Com. 339, 340.

[ \* 117 ]

*Ante*, p. 87, 90.  
Vaugh. 354.  
Bro. Commission, pl. 5.

*Ans.* This is no more a delegation than is to most corporations, for the king grants, that the mayor and aldermen of such a corporation shall be justices of peace, as they are now in London, this was never questioned to be good, and yet they are elected by the members of the corporation.

*Obj.* The extent of it in respect of place is too large.

Vaugh. 347.

*Ans.* The places are not exempted, but the persons in the places, for none but those that are of the corporation of vintners are exempted.

An authority or licence coupled with an interest, does not determine by the grantor's death. *Ante*, p. 88-9, 91. 8 Viner, 434. Bac. Abr. Authority, (E). *Post*, p. 332. So of a licence executed, and not executory only.

*Ante*, p. 88.  
Jenk. 209.

[ \* 118 ]  
Palmer, 71.  
8 East, 308.

*Ad secundam quæst'*—That it doth not determine by the death of the king, he held, for that this is more than a bare licence, for it is an interest, and it is the restoring of an interest, (which shall be always expounded favourably,) for it doth but give them that liberty that they had at common law. And if it were a bare authority, as hath been objected, yet it hath been long since executed in the life of the king, and so is not like an authority barely executory, for that determines by the death of the party, by reason that he that is to execute it, is to do it in the name of the party, which he cannot do when he is dead.

*Ad tertiam quæst'*, he said, he did not see that that was any point; for admitting that it was good in its creation, and \* continued so after the death of the king, then it was a privilege lawfully enjoyed by them, and so without doubt was saved by the proviso in the 12th of this king; and so he and *Littleton* concluded that judgment ought to be given for the defendants. [Continued, *post*, p. 128.]

( C. 138. )

TWISELTON *v.* DUNCKHILL.—In C. B.

§. C. 3 Keb. 191, 201.

The writ was returnable in *Cancellaria ubicunque*, &c. and the bail bond was conditioned to appear in *Cancellaria apud Westmonaster' ubicunque*, &c. Held a material variance.

*Ante*, C. 113.  
C. 123. 1 Vent. 234. 2 Vent. 238.

THE plaintiff was sheriff, and having an attachment against the defendant out of Chancery, returnable in *Cancellaria ubicunque tunc fuerit*, &c. the defendant gave bond for his appearance, conditioned to appear in the Chancery *apud Westmonaster' ubicunque*.

Two objections were made to this declaration:

1. Because it doth not appear that the plaintiff was sheriff at the time of taking of this bond, and that it was taken by the name of his office, and for that it was said, that *Burton* and *Loe's* case in Style, Pasch. 1650, was adjudged in the point. Cro. Eliz. 800.

2. It was objected, that the condition was repugnant and impossible, for it is to appear at the Chancery in *Westminster ubicunque*, &c. whereas if it be any where else it is impossible to appear in it at Westminster, and the Chancery follows the king; and it was said, that the condition of the obligation ought to be pursuant to the statute of 23 H. 6, 10.

*Ante*, C. 113.

On the plaintiff's part it was argued by *Sise*, that every variance is not material, so as the intent of the statute be performed. Dy. 119. Cro. Eliz. 862. And the form is not

so strictly to be pursued, but that immaterial things may sometimes be added or omitted. 2 Cro. 286. Dy. 364. Cro. Eliz. 466. *Curia advisare vult*.

*Nota q' en le 3 Leon. 208, dictum est q' cest stat' ne extend al Chancery. Quære, q' semble contra per Dyer (a).*

Afterwards this Term judgment was given for the defendant; because the writ being returnable *in Cancellaria ubicunque*, and the bond to appear *in Cancellaria apud Westmonast'* was a material variance, for it is possible the Chancery may be removed from Westminster before the day of the return; but if it had been a process out of the Common Pleas, that would have been good, for that Court is fixed in Westminster.

(a) That an attachment out of Chancery is not within the statute 23 Hen. 6, c. 9, see *Studd v. Acton*, 1 H. Black. 468. *Morris v. Hayward*, 2 Marsh. 280.

[ 119 ]  
( C.139. )

### THREADNEEDLE v. LYNUM.

Continued from p. 93.

THIS case was now argued by *Nudigate ex parte*, (*Broome concil' del auter part nient etant parat'*), and he held the lease was void for three reasons:

1. It is made when there was another lease in being of a great part of the land neither surrendered nor determined; and although it be found, that *cestui que vie* the lease for 99 years was made, died during the life of the bishop that made this lease, yet that will not alter the case; for if it were not good in its creation, it cannot by that means be made good by matter *ex post facto*. 10 Co. 61, 62. And when that tenant *pur auter vie* made a lease for 99 years, rendering rent, and then surrendered, the rent was clearly extinct. *Ante*, p. 93. Moor, 94, pl. 213, 253. Also the successor ought to have the land, or the rent, in the same plight as his predecessor had; and here, part of it being in lease, it is not in the same plight; as Litt. 83, a feoffment upon condition to reinfeoff, if the feoffee make a feoffment of but one acre, the plight of the land is altered.

Besides, this lease is made by force of a power, and powers ought always to be strictly pursued. 6 Co. 33. Cro. Eliz. 5. 1 Leon. 36. 3 Leon. 184.

2. This lease, though it be of land anciently let, yet it is not let as it was anciently; for the lease should be of the same lands, and neither more nor less; and these statutes shall be liberally expounded that are for the preservation of the rights of the church. 5 Co. 5.

3. The reservation is not so effectual as it ought to have been, for the successor hath not the same remedy for the rent (though it be the same in quantity) as his predecessors have had; for whereas the two manors used to be charged with the rent, now there is but one chargeable; for that which is in lease for years from the lessee who surrendered



[ \* 120 ]

is not chargeable with any rent at all, *pur les raisons supra*; Moor, 94; and by this means, if this lease be admitted good, the rent may become remediless; for if the first lessee had leased all but one acre, and surrendered that, and the bishop had leased that, reserving the old rent, this would by the same reason be good; for the finding the value doth not alter the case; and although it hath been objected, that tenant in tail may lease part of the land usually let, and reserve a rent *pro rata*, 1 Inst. 44 b. yet in \* *Montjoy's* case, it is denied by the Court, and yet, though that be a particular act of parliament, it is penned more indefinitely than this statute that enables bishops.

And whereas the case of the concurrent lease, in the case of *Fox and Collier*, Moor, 108, hath been objected, that is not like this case; for that is advantageous to the successor, for there he shall have both rents during the continuance of the first lease; for he shall have the rent upon the second lease by estoppel till the first is expired.

2 Cro. 453.  
1 Saund. 304.  
Bac. Ab. Leases,  
(E). Rule 5.  
Harg. Co. Lit.  
44 b. n. (3); and  
*vid. stat. 5 Geo.*  
3, c. 17.

And though a rent be recoverable, yet the bishop successor ought to have as easy a remedy as his predecessor; and therefore it is made a *quære* in Moor, 778, whether a rent reserved out of tithes shall be good, though it be for years; because there he may have an action of debt, but he cannot distrain; but if it be a lease for life, he hath no remedy. 1 Inst. 47. *Vide le case* 10 Co. 61. *Et adjournatur*. [Continued *post*, p. 165.]

( C. 140. )

## WARY v. CONQUEST.

*S. C. Whately or Waxy v. Conquest. Cart. 217. 8 Feb. 202.*

A licence pleaded indefinitely shall be presumed to continue, unless the contrary appear.

*S. C. Carter*, 218.  
*Com. Dig. Plead.*  
3 M. 35.

Where a party justified under the licence of a bargainee for 100 years, it was held unnecessary to allege the continuance of the estate.

The traverse of a bargain and sale must be *modo et forma*, without including the consideration, &c. in it.

REPLEVIN for taking his cattle 17 July.

The defendant justifies the taking, as in his freehold. The plaintiff says, that the defendant did for a valuable consideration bargain and sell to Maurice Tomson for 100 years, and that Maurice was possessed by virtue thereof, and did licence him to put in his cattle the first of July, and continued them in *quousque*, &c.

The defendant rejoins, and traverses the plaintiff's replication, *absque hoc*, that he did *per quandam indenturam* for the said term and consideration bargain and sell, *prout querens superius allegavit; et querens moratur*.

*Obj.* The defendant's counsel took exception to the replication, 1st, because he justifies the 17th of July by virtue of a licence to put in his cattle the 1st of July, and doth not say that the licence did continue. [Hob. 104.]

*Ans. per Curiam.*—The licence being pleaded indefinitely shall be presumed to continue, if no determination appear.

*Obj.* 2. It was objected, that the plaintiff doth not allege the continuance of the estate of Maurice Tomson, and if his estate be determined, his licence is no justification. [2 Roll. 698. *ante*, C. 128.]

*Ans. per Cur'.*—When it is alleged, that he had an estate by



bargain and sale for 100 years, his estate shall be presumed to continue till the end of that term, if the contrary do not appear; and if it were determined, the other side ought to shew it (a).

\* Then the plaintiff excepted against the defendant's rejoinder, because his traverse was not good; for he ought to have traversed, *absque hoc*, that he did bargain and sell *modo et forma*; but now he hath traversed the consideration, and made that issuable; and because of the multiplicity of the traverse, judgment was given *pro quer'*.

[ \* 121 ]  
Com. Dig.  
Pleader, G. 15.  
Doc. Plac. 344.  
1 Brod. & Bing.  
536.

But *Ellis*, Justice, took an exception to the declaration, because it is a replevin *pro captione ovium*, and he doth not say *verveces vel matricies*; and said he was formerly of counsel in the King's Bench, where it was ruled naught in a replevin, though it may be well enough in trespass; because a replevin ought to be more certain, because the plaintiff is to have return.

A declaration in replevin for taking sheep, must specify the sort of sheep (b).

Declaration in replevin requires greater certainty than trespass (c).

(a) Vaughan, C. J. thought it was necessary at least to aver that the bargainee was possessed at the time of the supposed trespass: and Wyndham, J. appears to have relied upon the great length of the term, which is reported by Carter, p. 217, to have been 200 years. On averring the continuance of estates, *vide* Com. Dig. Pleader, C. 66—68. *Attorney-General v. Buckeridge*, Hardr. 75.

(b) *Vid.* Alleyn, 33. 18 Viner, 580. But see *Berne v. Mattaire*, R. T. Hardw. 119. *Kempston v. Nelson*, Bac. Ab. Replevin, (H). *Pope v. Tillman*, 7 Taunt. 642. 2 Saund. 74, note (1), by Willms.

(c) *Semb.* acc. per Gibbs, C. J. in *Pope v. Tillman*, 7 Taunt. 643. *Hancock v. Hodges*, *post*, p. 357.

### WATERHOUSE v. SYMONDS.

( C. 141. )

*Semb.* S. C. *ante*, C. 116. Cart. 221. 3 Keb. 162, 418, 455, 460, 506, 577, 607.

DEBT against an executor upon an obligation. The defendant pleads several judgments, *ultra quod* he had not assets. The plaintiff replies that those judgments were kept on foot by fraud. The defendant rejoins, that the said several judgments were not kept on foot by fraud; and doth not say, nor either of them; and it is possible, that if one only be kept on foot by fraud, it may cheat the plaintiff of his debt; and for this cause judgment was given for the plaintiff (b).

A rejoinder by an executor "that the said several judgments were not kept on foot by fraud," without saying "or either of them," is bad (a).

(a) 4 Mod. 64. 1 Saund. 269, 312. 3 Salk. 209. 3 Bos. & Pull. 348. *ante*, p. 28, and note *ibid.* *Beake v. Kent*, 1 Show. 290. *Campion v. Bentley*,

(b) See *Chamberlaine v. Pickering*, 1 Espin. 343.

### TWYFORD v. BUNTLEY.—In C. B.

( C. 142. )

S. C. Cart. 205. 3 Keb. 183, 203.

DEBT upon a bond for performance of covenants, amongst which one was, that the defendant should convey such a tenement for the life of the plaintiff, and the life of two others, such as the plaintiff should name; and that he would give him possession before Christmas.

The defendant covenanted to convey a tenement to the plaintiff for the lives of the plaintiff and of two others named by him, and

The defendant pleads, that he always was, and is ready to

also to give up possession thereof before Christmas: held, that the latter covenant was not independent, and that if the plaintiff neglected to name the lives,

[ \* 122 ]

the defendant was not obliged to give up possession.

convey, if the plaintiff would name his lives; but by reason the plaintiff would not name his lives, he could not make his conveyance. Upon this plea the plaintiff demurs, and shews for cause, because the defendant had not alleged that he gave him possession before Christmas; and that he might have done, though he could not convey till the plaintiff had named.

*Sed per Curiam* judgment was given *pro def'*, because the possession shall not be intended a divided thing, but a possession pursuant to the lease that he was to make; for otherwise the possession given would be an act done to no purpose, for he might turn him out again presently. *Jud' pro def' (a)*.

(a) 2 Rol. Ab. 248, l. 50. 1 Bulst. 168. 3 Bulst. 168. For cases concerning the dependence or independence of cove-

nants, see Williams's notes to *Pordage v. Cole*, 1 Saund. 320.

( C. 143. )

CLOAKE v. HOOPER.

S. C. 3 Keb. 162, 202.

It is a sufficient breach of a covenant for quiet enjoyment, to shew a good title in another, without alleging an entry by the plaintiff and an eviction.

Viner Covenant, Z. 4 Co. 80.

THE defendant covenanted that the plaintiff should enjoy black acre without any lawful let, suit, or interruption, immediately after the death of Zenobia; and the plaintiff shews in his declaration, that the lands were part of the Dutchy of Cornwall, and did belong to the king; and that he by his letters patent had conveyed them to J. S., &c.

The defendant demurred, because the plaintiff did not allege an entry, and so could not be disturbed. *Per Curiam*, The declaration is good enough, for having set forth a title in the patentee of the king, the plaintiff shall not be inforced to enter, and subject himself to an action by a tortious act. *Jud' pro quer'*. 1 Rolle, 520, 430. Hob. 12.

( C. 144. )

KELLOW v. WESTCOMBE, *Executor de Son Tort*.

S. C. 3 Keb. 202.

One who gets goods of the testator into his hands may be sued as executor; although [afterwards and] before the writ brought, administration be granted to another during the minority of the rightful executors.

DEBT upon bond entered into by the testator, against the defendant, as executor.

The defendant pleads that the testator made A. and C. infants, his executors; and that administration *durante minore ætate* was committed to their father, who administered before the day of the writ brought.

The plaintiff replies, that goods of the testator's to the value of 500*l.* came to the defendant's hands (a); &c. And upon this the defendant demurred, and the plaintiff had judgment.—*Vide* 5 Co. 33. Hob. 49 (b).

(a) Before administration granted. *Vid.* S. C. Keble.

Term Rep. 97. 3 *Id.* 587. Com. Dig. Administrator, C. 1. *Garter v. Doe*, ante, p. 13. Viner, Executors, E. a. 3.

(b) See *Anonymous*, 1 Salk. 313. 2'

ANONYMUS.

( C. 145. )

S. C. *Ante*, p. 113.

THE Court was now moved again in the case of the proctor's fees: And it was urged again by *Goodfellow*, that no prohibition might go. 1. Because there is no precedent of any prohibition ever granted; and therefore it is probable by *Littleton's* reason, sect. 108, that none will lie, especially it being a thing of daily practice and occasion. 2. They are proper judges of their own fees: And \*whereas it hath been objected, that a jury is many times judge of their fees; for if they be indicted for extortion, then the jury must judge: That he said is allowed *propter necessitatem*, because they cannot be indicted for extortion in the Spiritual Court; but there they may sue for their fees, and so that reason fails in this case: And he said there was a precedent in the King's Bench, *inter Day and Dod*, Mich. 23 Car. 2(1), where a suit being for proctor's fees, there was one fee that they had alleged to be due by custom; and because the Spiritual Court cannot try a custom, they granted a prohibition. But the Lord Chief Justice *Hale* declared, that if it had been barely for fees, there ought to have been no prohibition. And *Vaughan*, Chief Justice, was strongly against the prohibition; for he said, this case did not much differ from the case in 12 H. 7, 23, for that was for costs, and fees are costs of suit: But the other judges took a difference; for they said, that when a suit is in the Spiritual Court, for a matter of which they have cognisance, that costs is part of the judgment; but this doth arise upon a temporal contract; for if I retain a man to prosecute a suit for me, there is an implication of contract that I shall pay him fees and expences. And the party in this case may have remedy at law, and then he shall not have remedy in the Spiritual Court; for the causes of which they have cognisance ought to be merely spiritual. 7 Co. *Ken's* case, 43. And it is no more strange that a proctor should sue for his fees at the common law, than that a solicitor in Chancery should sue here for his (2); and the Court may take notice of their fees as well in this case as in that. *Sed advisare volunt.* [S. C. *post*, p. 129.]

Whether a prohibition lies, where a proctor sues for his fees in the Spiritual Court?

[ \* 123 ]  
3 Leon. 268.

(1) *Semb. S. C.*  
1 Vent. 165; and  
2 Keb. 810, 845.  
*Post*, p. 129.

The costs of suit in a Spiritual Court are part of the judgment, and may be sued for there. F. N. B. 52. D. M. *Post*, p. 130.

No suit shall be in the Spiritual Court, where there is a remedy at law. Co. Lit. 96 b. *Post*, p. 130.  
(2) 10 Mod. 264.

DE TERM. S. MICH. 1673.

[ 124 ]

IN COMMUNI BANCO.

BLOXAM v. WALKER.

( C. 146. )

THAT whereas the plaintiff and defendant had exchanged certain goods, the defendant did promise to save the plaintiff harmless concerning those goods which he had given the plaintiff in exchange; and the plaintiff shews that one J. S. brought an action of trover, and recovered them.

See margin,  
*post*, p. 130.

Cro. Eliz. 213.  
*Ante*, C. 121.  
*Post*, C. 163,  
 612.

It was moved in arrest of judgment, that it is not set forth that J. S. who recovered the goods, had a title, which *Maynard* said ought to have been done: and he took a difference where a promise is to save harmless against a particular person; there he ought to defend him against that person, be it by right or wrong, for he is damnified if he be disturbed; but if it be to save harmless generally, it amounts to no more than a warranty against lawful titles.

2. Exception was, because he alleges that J. S. recovered them in the Court of Marlborough, and doth not make it appear that the Court had jurisdiction of them; but the record not being in Court, *Curia advisare vult*. [*S. C. post*, p. 130.]

[ 125 ]  
 ( C. 147. )

PORTER v. BILLE.

In *assumpsit* against an heir on a promise to pay his ancestor's bond-debt in consideration of the plaintiff's forbearance to sue it is unnecessary to aver assets by descent. But it must appear on the declaration that the heir was chargeable by the bond; otherwise judgment will be arrested.

An executor may be sued on a promise in consideration of forbearance, without averring assets, and although he have none.  
 Cro. Car. 147.  
 Cro. Jac. 273,  
 613.  
*Post*, C. 537.

WHEREAS the defendant's father was indebted to him by an obligation, &c. and died; and the defendant being his heir, the plaintiff had a design to sue him; but the defendant, in consideration the plaintiff would forbear to sue him, promised to pay the money. Upon *non assumpsit*, a verdict was for the plaintiff; but it was moved by *Baldwin* in arrest of judgment, because it doth not appear upon the whole declaration, that the heir was chargeable, and then there was no consideration; for he doth not say that he bound him and his heirs. And *Baldwin* cited a case in the King's Bench between *Rosier* and *Langdon* [Styl. 248], where the wife of the debtor (deceased) was sued upon a promise to pay in consideration of forbearance; and because it did not appear upon the whole record, that she was executrix or administratrix, or any way chargeable, judgment was arrested. 3 Leon. 67. *Post*, Case 177, 595. Yelv. 56. Jones, 199. Sty. 405. 2 Cro. 257.

But all the Court agreed, that if an executor be sued upon a promise to pay in consideration of forbearance, it is not necessary to aver assets, according to *Banes's* case, 9 Co. 94. And so they said in case of an heir it is not necessary to aver assets; but it must appear that he is chargeable, which doth not in this case; for the heir is not chargeable unless he be named; *contra* of an executor; and so an executor is liable to the suit, though he have not assets (a).

*Tota Curia contra querent'*. Serjt. *Goodfellow* took this difference, that if a stranger promised, in consideration a creditor would forbear the executor, that he would pay, there it ought to appear that the executor had assets. *Sed quære*.

(a) As to the necessity of shewing the lien on the heir, see *Hunt v. Swain*, T. Raym. 127. 1 Lev. 165. *Barber v. Fox*, 2 Saund. 136, and note (2), *ibid*. *Crossing v. Honor*, 1 Vernon, 180. That executors are liable in case of forbearance, although there be no assets, see

1 Rol. Ab. 24. 1 Vent. 120. 1 Vesey, senr. 126. 1 Saund. 210, n. (1). 2 *Id*. 136, n. (2). 2 Brod. & Bing. 460, 464. The Statute of Frauds requires such agreement to be in writing. *Rann v. Hughes*, 7 Term Rep. 350-1, n.

## FOWLE v. DOGLE.—In C. B.

( C. 148. )

S. C. Cart. 239. 3 Keb. 186. 1 Mod. 181.

FORMEDON in remainder of 140 acres, lying in two vills: See the margin,  
The tenant, as to 100, pleads non-tenure, and that J. S. is p. 157.  
tenant.

And as to the residue, that Peter Farnham was seised in fee, and had issue three daughters, Mary, Lucy, and Ruth; that he made a feoffment to the use of Mary, and the heirs of her body; the remainder to Lucy and Ruth, and their \* heirs. Mary takes husband, and she and her husband levy a fine with warranty against them and the heirs of Mary, to the use of her and her husband for their lives, the remainder to the right heirs of the husband: Mary dies without issue, the husband survives, Lucy and Ruth are demandants, and the husband is tenant.

[ \* 126 ]

[The case is stated with some difference in the other reports].

Exceptions taken to the tenant's plea.

*Obj.* 1. He pleads a special non-tenure to 100 acres, parcel, &c., and doth not shew which of the two vills they lie in, which ought to be done. 5 Ed. 3, 184, 140.

*Ans.* 1. It is a matter that the demandant may as well take notice of as the tenant.

2. If a plea be according to the demand, it is well enough, and the demandant hath not shewn which lay in one vill, and which in another.

If a man plead non-tenure to all, a general non-tenure is good.

But if it be to parcel, he must shew who is tenant of that which he disclaims; and so is 6 Ed. 3, 243 b. Br. Non-tenure, 5. The reason is given in Britton, 214, because the demandant may reply, that the tenant in the writ is tenant of that parcel; or that he, that he hath alleged to be tenant, is but for years, or his villein.

But the Court confessed that the books were so; but they never understood the reason why the tenant in the writ should find out a tenant of the land, if he had it not himself, any more for part than for all: and *Ellis* said, that it is not traversable that he is not tenant (1).

Vid. post, p. 157.

(1) *Sed vid.*

3 Lev. 330.

1 Lutw. 38.

Hawk. Ab. Co.

Lit. 362.

And as to the authority of shewing in which vill the lands lie, according to 5 Ed. 3, 184. *Baldwin* said there was a later authority, that it was well enough without it, which was 35 H. 6, 51.

*Obj.* 2. The tenant pleaded a fine of a fourth part, *per nomen* of a third part, and doth not aver that it is the same.

*Ans.* If a *per nomen* be repugnant or incongruous, it is naught. Plow. 150. Cro. Eliz. 662; but here a third part comprehends a fourth part, and so is well enough. Cro. Car. 110.

Ante, p. 77.

Post, p. 157.

*Obj.* 3. Mary is tenant in common with her other sisters, and they are seised *per my et per tout*.

*Ans.* Tenants in common may infeoff one another, and

much more strangers; and a fine is but a feoffment on record, 26 H. 8, 9. Cro. Eliz. 639.

[ \* 127 ] But the great question was, whether this fine and warranty be any bar or not? And *per Baldwin* it is; for,  
\*1. When Mary being tenant in tail in possession levies a fine, this makes a discontinuance.

*Post*, 158.

2. This is a collateral warranty, for the estate doth not descend from the party that levies the fine; and this case is much stronger than Cro. Car. 156, for here the warranty is annexed to the fine, which makes the discontinuance. Litt. sect. 716. 2 Cro. 217.

But the main objection is, that although the fine be a discontinuance, and the warranty collateral, and should have bound, had Mary been a feme sole at the time of the levying of the fine, yet here the warranty being against her and her husband, and her heirs, while the husband lives, the warranty shall not descend; and so seems the opinion to be in Sir *William Herbert's* case, 3 Co. 14. If baron and feme warrant land against them and the heirs of the feme, the feme dies, and the baron survives; the lands of the baron only shall be put in execution.

*Ans. per Baldwin.*—It is not said that the lands of the husband shall be put in execution, but may be, &c. which makes as much for me; for as the lands of the husband alone may, so the lands of the feme alone may.

And besides it is the estate of the feme, and the warranty is to work against her and her heirs; and certainly, if it were in case of a voucher, the heir of the feme might be vouched without the husband, and much more shall they be rebutted.

Where two matters, as a fine and warranty, are pleaded, and one only relied upon, the plea is not double. Doct. Plac. 136, 140. March, pl. 84. 1 Sid. 357. 1 Burr. 316. *Post*, p. 259.

*Obj.* To the conclusion of the tenant's plea; for he sets forth the fine and warranty, and relies upon them both.

*Ans.* He could not plead otherwise, nor better than he hath; for he must plead the fine, otherwise the warranty by a feme covert would have signified nothing; but he doth not rely upon both, for that would have been double, but upon the warranty contained in the fine, *ad quam se tenet*.

If a man pleads two matters where he cannot do otherwise, the plea is good enough. 5 Ed. 4, 74. Bro. Double Plea, 35. 8 Co. 51. [Continued, *post*, p. 157.]

( C. 149. )

ROGERS v. DANVERS.

S. C. 1 Mod. 165.

An executor may plead a statute or bond outstanding, in which he himself was jointly and severally bound with the testator: but

DEBT upon an obligation against an executor.

The executor pleads, that the testator was indebted by statute staple (a) to J. S. 200*l.* and that he had not assets to satisfy that.

[ \* 128 ] \* The plaintiff replies, that the executor himself was bound with the testator.

The defendant demurs.

(a) *Quære*, a recognizance in the nature of a statute staple? *Vid.* 1 Mod. 165.



The question was, whether or no, when two are bound and one dies, and makes the survivor his executor, it shall be in the power of the executor to discharge this debt which he himself is bound for, and plead it in bar to other creditors?

And the Court resolved, that if so be the obligation be joint and several, there it is in the election of the creditor to charge the executor of the testator, or the survivor; and so in this case the conusee, if he had pleased, might have charged the defendant as executor to the other conusor; and they agreed also, that the defendant may, if he please, pay this debt out of the estate of the testator, and plead it to the other creditors; for the testator, by making him executor, hath put it in his power to pay this debt first, if he pleaseth, for which he himself stands engaged; and they said that it is very common, when a man is bound as surety for another, to make the surety executor, that he may have power to pay the debt, and indemnify himself; and it is every day's experience, upon "Fully administered," to give in evidence payment of debts, for which the party himself is jointly obliged.

But they agreed, if the statute had been only joint, or if it had been a joint obligation, there the survivor must be charged out of his own estate, and the executors of the person dead are not chargeable (*b*).

It was moved, that this was a joint statute, and not joint and several. But it was answered, that although the first words were joint, yet the latter words, *si defecerimus, volumus, etc. quod currat super nos et quemlibet nostrum*, made it several, as it is in an obligation, the beginning is joint, but then *obligamus nos et quemlibet nostrum* makes it several; and this being made according to the form set down in the statute of 23 H. 8, 6, the Court resolved it was joint and several; and so judgment was given for the defendant.

(*b*) The representative will be charged *pari passu* with the survivor in Equity. 1 Atk. 89. Com. Dig. Chancery, 4 D. 6. and *vid.* 2 Bos. & Pull. 268, 270.

not if the statute, &c. was joint only. See *Perkins v. Perkins*, Trials per pais, 411, 7th edit.

If an obligation be joint and several, the creditor may charge the surviving obligor, or the executor of the deceased at his election.

2 Burr. 1190.

3 Brod. & Bing. 302.

*Post*, Case 468. 3 Co. 14. 32 H. 6, 31.

A recognizance according to the form of 23 Hen. 8, c. 6, is joint and several. 19 Viner, 539.

'*Obligamus nos et quemlibet nostrum*,' makes a bond joint and several. 2 Rol. Ab. 148. Dyer, 310 b. 3 Leon. 306.

### THOMAS v. SALTMARSH. [*qu.* SORRELL?]

(C. 150.)

Continued from p. 118.

THIS case was this Term argued by *Rainsford* (1) and *Turner* (*a*); and they both held,

(1) See his argument in 3 Kebl. 223.

1. That this patent was good in its creation.

\*2. That it was not determined by the death of king [ \* 129 ] James.

3. That the liberty granted was saved by the proviso of the 12th of this king.

*Turner* took an exception to the defendant's plea; for whereas he had pleaded *Nil debet*, he ought to have pleaded the special matter; for when an information or action is

In debt on a penal statute, defendant may shew a proviso in the same

(*a*) See 3 Keb. 226. Note, he was Baron Turner, who also argued, is not Baron of the Exchequer. The Chief noticed by Freeman.

statute, or a licence in pursuance of such a proviso, upon *nil debet*. *Per Hale. Vid.* 21 Jac. 1, c. 4, § 4. 2 Hawk. c. 26, § 69. 4 Burr. 2469.

*Vid. ante*, p. 83, C. 102.

brought upon any statute, if the defendant be discharged by any proviso in that statute, he may give it in evidence; but if it be any foreign matter, yea although it be a licence according to a proviso of that statute, he must plead it; and cited 2 Roll. 682. *Hale* said,—A licence pursuant to a proviso was all one as a proviso; and so might be given in evidence.

And he took another exception to the information; for the information was exhibited as it were upon the 10th of June, for selling wine without licence from the first of June to the 20th of June; and the jury find, that the defendant is guilty as is alleged in the information; and part of the time there alleged is after the information exhibited, and so the plaintiff could have no judgment.

*Nota*; These two exceptions were never taken notice of by counsel or judges till *Turner* argued, who was the eighth Judge that argued. [Continued, *post*, p. 137.]

( C. 151. )

HAUGHTON v. WILSON.

*Semb. S. C. ante*, p. 113, 122. 1 Mod. 167. 3 Keb. 203.

A proctor libelled for fees in a Spiritual Court, and for expences of journey, &c. a prohibition was granted *quoad* all but the fees. [See note (a), p. 113]. 1 Rol. 533.

Where a custom is controverted in the Spiritual Court, a prohibition lies. *Ante*, p. 123. *Post*, p. 290, 300.

A PROCTOR libelled for fees in the Spiritual Court in a suit there, and for the expences of a journey, and the charge of a messenger, &c. The party that was sued moved for a prohibition.

*Per Vaughan* and *Windham*.—For those fees which are due to him by the custom of the Court it is a proper place to sue for them, and they are proper judges; but if the custom be controverted, the party shall have a prohibition; for they cannot try a custom, whatever the matter is that it arise upon; as a *modus decimandi* may be sued for there, but if the *modus* be controverted, a prohibition shall be granted.

But for those things that are grounded upon contract, or *quantum meruit*, as for charges of journies, and messengers, &c. they cannot try them there; and for these they granted a prohibition; but for the fees of the Court they would grant none.

[ \* 130 ]

\* *Atkins*.—A prohibition ought to be granted for the whole; and they ought not to libel there for a proctor's fees, for it is a lay suit, and supposes a lay contract, where a man retains a proctor, that he will give him his fees.

12 H. 7, 23, 24.

Costs are part of the decree in the Spiritual Court. *Ante*, p. 123. 9 East, 298.

And this differs from the case of costs; for they may give costs, for that is part of the suit and decree, as with us it is part of the damage of the party, and in the same judgment.

123. 9 East, 298.

*Acc. ante*, p. 123.

And he laid it for a rule, that wheresover there is a remedy at common law, the Spiritual Court shall have no consueance; and certainly the proctor might have had an action on the case for his fees. (But *Windham* doubted, whether he could recover his fees or no, by an action of the case.)

[*Vid. ante*, p. 113, C. 134, n. (a).]

*Ante*, p. 123.

And he said, a proctor shall no more sue for his fees in

the Spiritual Court, than a six clerk shall exhibit his bill in Equity for his (1).

And it is not enough to entitle the Spiritual Court, that the suit do concern some spiritual matter, for the register's place is an office in the Spiritual Court; yet if there be a controversy for it, it shall be determined at the common law. 2 Roll. 283, 285. A prohibition was granted for all but the proctor's fees. (*Ellis absente.*)

(a) Com. Dig. Prohibition, F. 4. 1 Burr. 367.

(1) *Quare*,  
*Vid.* Bac. Ab.  
Fees, (D).

A suit concern-  
ing the office of  
register in the  
Spiritual Court  
must be brought  
at common  
law (a).

### BLOXAM v. WARNER.—In C. B.

( C. 152. )

*S. C. ante*, p. 124.

**ACTION** upon the case. Whereas the plaintiff on the 21st of May, 1670, had bought several goods of the defendant, the defendant did promise to save him harmless concerning the said goods; and he sets forth, that J. S. brought an action of trover for the said goods, and declared, that whereas he was possessed of those goods the 12th of April, 1670, *ut de bonis suis propriis*, &c. and he recovered them, &c. Upon a verdict for the plaintiff, upon *non assumpsit*, it was moved in arrest of judgment,

1. Because it is not alleged, that the plaintiff gave the defendant notice of these suits. And as to that the Court held that was well enough, for notice is not alleged in any of the precedents. And *per Windham*, Where a thing lies particularly and solely in the notice of the party that is to take advantage, there he shall allege notice; but here he may have notice from the party, or may have notice from him that recovered the goods (a).

\*2. As to the second objection, that it was not alleged that the recovery was by an eigne title, the Court said, that did appear in the record, and so it was well enough; for it is alleged, that J. S., who recovered them, lays a property in himself the 12th of April before the sale, and so it must necessarily be eigne to the plaintiff's title. And so judgment was given for the plaintiff (b).

action by the vendee, it is enough if the elder title of the evicting party appears of record.

In *assumpsit*  
on a promise to  
save harmless  
the vendee of  
certain goods,  
the declaration  
stated a recovery  
of the goods by  
a stranger: an  
allegation of no-  
tice to the de-  
fendant was held  
unnecessary.

Notice must be  
alleged of a mat-  
ter, which lies  
particularly and  
solely in the  
knowledge of

[ \* 131 ]  
the party that is  
to take advan-  
tage.

A general pro-  
mise of indemni-  
ty to the vendee  
of goods extends  
only to lawful  
evictions. In an  
2 Mod. 213.

(a) *Ante*, C. 40. *Post*, C. 270. *Duffield v. Scott*, 3 Term Rep. 374. Com. Dig. Pleader, C. 75. *Cutler v. Southern*, 1 Saund. 116, and n. (2), *ibid.*

(b) *Ante*, p. 103, 124, 142. *Post*, p. 450. 5 Viner, 180. 4 Term Rep. 617. 8 *Id.* 278. 2 Bos. & Pull. 13, n. and *Wotton v. Hele*, 2 Saund. 181, n. (10).

### ATWOOD v. SANDERS.

( C. 153. )

**TRESPASS** for taking two mares, one gelding, and cutting a waggon.

The defendant justifies for heriots for four cottages, &c. *Baldwin* took several exceptions to the justification.

1. He says the king was seised of the manor of Rowington *prædict'*, whereas he had not mentioned any manor before.

Form of plead-  
ing a justifica-  
tion in trespass  
for heriots.

*Prædictus* is  
surplusage,  
where there is

no previous mention of the thing to which it is added.

Yelv. 111.

Heath's Max. 116, 120.

(1) 1 Saund. 187, n. (1).

The party's title must appear without putting the Court to compute time, &c. *Per Atkins, J.* (2) Acc. Cro. Car. 260. Com. Dig. Copyhold, K. 25.

To that the Court said, it was well enough, for *prædict'* shall be taken for surplusage, and void.

2. He entitles himself to the manor by a grant from the king *per literas patentes*, and doth not say *in Curia prolat'* (a), nor doth allege that they were sealed, nor with what seal (1).

3. He makes title by a grant of king Charles the First, *pro termino 60 annorum*, and doth not say when it began or ended. And whereas it was answered, that it did appear the term could not be ended, because it was not 60 years since the beginning of the reign of king Charles the First; *Atkins* said, they should not be put to it to compute that, but the party ought to make it appear that he hath a title.

4. He says, his tenant was possessed of these goods, and doth not say *ut de bonis suis propriis*, and he might have them by bailment, and they ought to be the proper (2) goods of the party that are seised for heriots.

5. He saith he seised the waggon *ut optimum animal*.

6. The plaintiff in his replication hath alleged, that the estate was granted to the defunct, and another who survives. *Et adjournatur* (b).

(a) See 10 Co. 92. 2 Salk. 497. Willes, 688.

(b) See the precedents, 2 Lutw. 1310. 9 Wentw. 279. Rast. 650.

( C. 154. )

LEVER v. HIDE.

S. C. *Gleever v. Hinde*, 1 Mod. 168.

A private person may justify

[ \* 132 ]

a battery by a plea of *molliter manus imposuit* to prevent the plaintiff from disturbing the burial service.

1 Saund. 13.

Comb. 17.

1 Hawk. c. 63, § 29. Lib. Placitandi, 326, pl. 47. Rast. Ent. 613, edit. 1670.

1 Keb. 491.

1 Haggard, 174.

BATTERY. The defendant justifies, for that he was at the funeral of J. C.; and as the minister was burying of her, the plaintiff did disturb, and threaten *et insultum fecit*; \* whereupon the defendant, to prevent the disturbance, *molliter manus imposuit*. And the plaintiff demurs.

*Turner pro quer'* argued, that the plea is not good, because the defendant doth not shew any authority he had, viz. that he was constable, or churchwarden, or parson, or curate, or relation to the party deceased, but a mere stranger. 22 Ed. 4, 45. It appears that it is not sufficient cause to lay hold of a man to prevent a disturbance. A constable imprisoned a woman (that would have left a bastard child, and have gone her ways) till she found security for the peace. Resolved it was not lawful; but he should take her to a justice of peace. 1 Leon. 327. Plow. 462. Dy. 120. And he said, the statute of 1 Mar. cap. 3, had provided a remedy for those that caused disturbance in divine service; and so had 1 Eliz. (1).

(1) *Vid.* Burn's Just. tit. Public Worship.

*Jones pro def'*.—Every man hath an authority to prevent disturbance and breaches of the peace; and a man may in several cases justify the laying his hands, as in defence of his person, or servant, or goods; as also for the public benefit; as if a man be beating another, I may hinder him; though if there be nothing but words between them, I cannot, 22 Ed. 4, 45; because it is for the public good: and so a man may

3 H. 4, 9.

19 H. 6, 31.

2 Rol. 546, 559.

apprehend a cheat, and carry him before a justice of peace. Cro. Car. 234. And in the case of 1 Leon. 327, the constable might have kept her till he could have had her before a justice of peace; but there he imprisoned her till she would give security, &c., which was not lawful. 2 Bulst. 53.

And he said, the minister is the servant, and the mouth of the people, and so they might justify in defence of their servant and mouth which was assaulted; and though the statute of 1 Mar. cap. 3, gives justices of peace power to imprison, yet that doth not take away the power that every man had by the common law to prevent disturbances; and our Saviour himself scourged the buyers and sellers out of the Temple. *Vide* Old Entr. 142 b. Rastal, 613.

*Atkins* said, it is in the nature of a nuisance, which any man may remove, so long as he does but *molliter manus imponere* (2).

*Windham*.—If two be fighting, any man may part them to preserve the peace (a). *Jud pro def' nisi*, &c.

(a) 2 Rol. Ab. 559. Lilly, Ent. 481. assault. *Griffin v. Parsons*, Selwyn's Ni. Pri. tit. Assault and Battery, 1. And it has been held that such an interference will not always amount to an

(2) Salk. 458.

If two be fighting, any one may part them to preserve the peace.

### AMY v. ANDREWS.

S. C. 1 Mod. 166.

[ 133 ]  
( C. 155. )

IN consideration the plaintiff would go before a justice of peace, and swear that the defendant owed him 10*l*. he would pay it him. Upon *non assumpsit*, a verdict for the plaintiff: it was moved in arrest of judgment, that this was no good consideration, because it was an unlawful oath, a justice of peace having no power to take it, and was no more than if the party should have sworn before J. S. And of that opinion was *Vaughan*, Chief Justice; and he cited the definition of an oath, 3 Inst. 165. Fleta, 5 lib. 22 cap. It ought to be *propter necessitatem* when a person is compelled (1) to it; And he said the consequence of such oaths would be dangerous, for it is the next step to the making a law to lay aside all juries, which are the greatest security of our rights and liberties; and in some cases there are laws already to make the oaths of two persons before a justice of peace a sufficient conviction, as in hunting deer. 13 Car. 2, 10. And he said a legal oath cannot be ministered but by one that is authorized by act of parliament (a); and to this purpose a justice is not (b); and so the party ministers it to himself, which cannot be; and every oath is promissory (2); as to speak the truth, &c. And a man cannot promise to himself, for such promise, as soon as it is made, vanisheth. A bishop may swear *visis Evangeliiis*, and not *tactis*, and it is good enough.

*Assumpsit* lies upon a promise by defendant to pay his father's debt, in consideration that the plaintiff would bring two witnesses to swear before a justice that his father had promised to pay.

(1) But see Cro. El. 470. 3 Salk. 248.

(2) *Sed vid.* 3 Inst. 165.

A bishop may swear *visis Eran-*

(a) Or by the common law. 2 Inst. 479. 1 Atk. 42. legality of extrajudicial affidavits, see Cro. Eliz. 470. 4 Bl. Com. 137. 3 Inst.

(b) The power of a justice of the peace to administer an oath is discussed in *Bramah v. — Insurance Company*, 3 Chetw. Burn's Just. 532. Cro. El. 262.



gelis, and not  
tactis. Per  
Vaughan, C. J.

And he said kissing the book doth not alter the case, for that is but a circumstance imposed by civil authority (c).

And he said, unless an oath be ministered by a legal authority, it is impossible to know whether or no he swear, for he may use the words and circumstances, and not swear; as the pronouncing the creed by an infidel; and bowing at the name of Jesus, may be without belief: and he said, such an oath is punishable by the statute of swearing, and setting in the stocks.

But *Windham* and *Atkins* held it a good consideration; and they said such an oath was lawful, because it was to end strife. *Jud. pro quer', nisi, &c. (d)*.

See 1 Mod. 166.

*Memorandum.* That this promise was, that whereas the defendant's father being indebted to the plaintiff had promised to pay, the defendant promised that if the plaintiff could bring two witnesses to swear that his father promised to pay it, before a justice of the peace, he would pay it: but however the case is the same.

(c) Cowp. 389. 1 Atkins, 42, 48. Paley's Moral Phil. B. 3, P. 1, c. 16, § 1. On the antient form, see Barrington's Observations, 177, 5th edit.

(d) See ante, C. 66, and notes, *ibid.* C. 136. Sir T. Ray. 153. 3 Lev. 240. Gilb. Evid. 67, 4th edit. 3 Stark. 160; and cases in 1 Viner, 298.

[ 134 ]  
( C. 156. )

BONE v. ANDREWS.—In C. B.

Whether a special imparlance shall estop the defendant to plead a tender? 2 Viner, 308-9. *Vid. post*, p. 205.

ASSUMPSIT for money due for work. The defendant hath a special imparlance, *salvis omnibus exceptionibus tam brevi quam narrationi (et advantagiis omitted)* and then comes and pleads that he tendered him the money, and was always ready to pay him, *et uncore prist*. The plaintiff in his replication shews, that the defendant did imparl *ut supra*, and demands judgment, whether or no, after this imparlance, he shall be permitted to plead a tender, and that he was always ready.

*Baldwin pro def'*.—A man may plead a tender after imparlance, and so is Dyer, 300; for he said he did not know any thing that might not be pleaded after a special imparlance, but privilege and pleas to the jurisdiction; and the reason why the party shall not be admitted to plead these, is because by imparling he admits the jurisdiction of the Court. 22 H. 6, 7. Rast. Ent. 473 b. And so he said it was held by the Court of King's Bench, between *Trussell* and *Maddel*; there the party pleaded a privilege after imparlance, and it was disallowed (1); but it was held by the Court, that in all things but such as do disaffirm the jurisdiction of the Court, a plea after special imparlance was allowable.

(1) S. C. 1 Sid. 318. 2 Keb. 103, 121, 163, 288, 301.

*Turner pro quer'*.—It is a contradiction, after an imparlance, to plead he was always ready; for if he were ready, why did he imparl? Besides, the entry is "saving all exceptions to the writ and the declaration," and he shall not have more than he hath reserved, and Bro. Tout Temps prist 27 accordant. 2 H. 6, 13.



*Windham*, Justice.—Perhaps if you had pleaded your tender, and that you are now ready, as it is pleaded in *Dyer*, 300, it might have been good; but now it seemeth that you are estopped to plead that you were always ready. *Et Atkins incline à ceo, cæteris absentibus; sed advisare volunt.*

## WHITE v. COLEMAN.

( C. 157. )

S. C. 3 Keb. 247.

TRESPASS for taking two mares in B.

The defendant pleads that the king was seised of B. and he took them damage-feasant as bailiff to the king.

\* The plaintiff replies that he was an inhabitant in Camilton, and that the Mayor and Burgesses of Camilton had common of estovers of turves for them, and for every inhabitant, to burn *in quibuslibet messuagiis suis*.

The defendant demurs. The exceptions to the replication were,

1. If *messuagiis suis* shall be intended only the houses of the mayor and burgesses, then the replication is bad, because the plaintiff hath not averred that he was an inhabitant in one of the houses of the mayor or burgesses. But to that the Court inclined, that *suis* shall intend the houses of every inhabitant.

2d Excep. If *suis* shall relate to the messuages of every inhabitant, then the prescription is bad; because inhabitants cannot prescribe for an interest, but for an easement they may. 6 Co. *Gateward's* case. 7 Ed. 4, 26. 15 Ed. 4, 29.

3. The prescription is not for estovers to antient messuages; and if this prescription were good, every inhabitant that builds a new messuage shall have estovers belonging to it.

4. It is not said *Estoveria rationabilia*; but *Estoveria ad habitata sua*, which is unreasonable.

5. Here is a departure, for the trespass is laid to be at Lancaster. The defendant justifies at Lanteyo, *absque hoc*, that he took them at Lancaster. The plaintiff replies that he hath common, &c. in Lanteyo, and so departs from his declaration.

And in 43 Ed. 3, 11, pl. 2, a replevin was brought, and declares of taking the 4th of May; the defendant justifies the taking the 20th of May; the plaintiff says in his replication, that he had common there the 20th of May; and adjudged a departure; and as that was in time, so this is in place.

As to the third exception it was answered, that if it had been necessary, it should be intended an antient house, when there is a prescription for estovers to it. 1 Bulst. 93. Lat. 100. 3 Bulst. 334. *Harrison's* case.

But by *Vaughan* and *Atkins* it seemed, that the new houses shall have estovers, and the new inhabitants also as well as the old, by virtue of this prescription: for they said, if a man

The mayor and burgesses of a

[ \* 135 ]

borough may prescribe for common of turbarry for themselves and the inhabitants.

And new houses and inhabitants, as well as old ones, shall have the benefit of this prescription.

*Mellor v. Spate-man*, 1 Saund.

343. Com. Dig. Prescription, H.

*Ad proximum antecedens fiat relatio*, &c. *Vid.* Finch's Law, p. 8; and Noy's Max. p. 2.

A grant of common to a mayor and burgesses will extend to

an increased number of burgesses. *Dub. Windham, J.*

[ \* 136 ]

Inhabitants cannot prescribe for common in their own name. 1 *Ld. Raym.* 405. *Post, C.* 398. 2 *Wilson*, 260.

grant common to the mayor and burgesses of such a place, and there are but ten burgesses at the time of the grant, and afterwards there are twenty, they shall all have common: and so it is in case of inhabitants, if they increase, the common shall increase. *Sed Windham dubitavit*; \* because he said it shall only be to those that were capable at the time of the grant.

To the second exception *Vaughan* said,—Though inhabitants cannot prescribe for common in their own names, yet they may be capable of the benefit of such a prescription: and as this prescription is laid for the mayor and burgesses, they may prescribe for them and for the inhabitants; and that is the direction given in 15 *Ed.* 4, 29, by *Littleton*.

But to the fifth exception, *semble q' est departure (a); sed adjournatur. Postea jud' fuit done pro quer'*.

(a) *Sed quære?* *Vid.* *Lutw.* 1437. 1 *Salk.* 222-3. 2 *Wms. Saunders*, p. 5, n. (3).

( C. 158. )

IRONMONGER v. HOLLAND & Ux'.

In trespass for assaulting, wounding and menacing, &c. a plea of justification in defence of freehold needs not specifically answer the menacing. *Doct. Placitand.* 55. *Moor*, 705. 3 *Wils.* 292. 3 *Term Rep.* 292. *Com. Dig. Pleader*, E. 1. A wounding cannot be justified in defence of property, without shewing a previous assault by the plaintiff.

THE plaintiff declares for assaulting and wounding his servants, and menacing them so that they durst not go about his occasions.

The defendant justifies because they came into his orchard to cut up his trees, and he (and his wife as his servant) did *molliter manus imponere* to prevent them, and *si quod aliud malum* came to the plaintiff or his servants, it was *causa prædicta*.

*Obj.* The plaintiff demurs, because he answers nothing to the menacing, &c.

*Ans.* He says *quoad ven' vi et armis non culp. et quoad residuum transgressionis præd'*; which goes to all, and concludes *si quod aliud malum* came to him, it was *causa prædicta. Adjournatur. Postea* it was adjudged that the plea was well enough, and went to all by reason of the *si quod aliud*, &c. for he might lawfully menace them, if they came to cut his trees.

And whereas it was objected, that no answer was made to the wounding, because a man cannot beat nor wound another in defence of his goods or freehold.

*Ans. per Cur'*.—Though a man cannot justify the wounding of another barely in defence of his freehold; yet if he doth first *molliter manus imponere* to hinder him, and thereupon the other assaults him, he may upon that justify the beating and wounding him (a).

(a) 1 *Sal.* 407. 8 *Term Rep.* 78, 299. 4 *Taunt.* 822. And the defendant must be prepared to prove that the malice or wounding was proportioned to the assault. *Buller's Ni. Pri.* 18. *Vid.* 5 *Barn. & Ald.* 220. See further on the justifications of assault and battery, *Greene v. Jones*, 1 *Saund.* 296, n. (1).

## DE TERM. S. HILARII, 1673.

IN COMMUNI BANCO.

THOMAS v. SORRELL.

( C. 159. )

Continued from p. 129.

SATURDAY the 2d in the Term. This day the two Chief Justices argued, and both agreed, that judgment ought to be given for the defendant.

The arguments of Twisden, J. and Turner, C.B. are to be found in 3 Kebl. 233 and 236.

The argument of Hale, C. J. is in 3 Kebl. 268.

See the argument of Vaugh. C. J. in his report.

As to the second and third questions, viz. whether the patent did determine by the death of king James, and whether it was saved by the proviso of the 12th of this king, they made little doubt; but agreed, that if it were good in its creation, it did not determine by the death of king James; and it was also saved by the proviso of the 12th of this king: but all the doubt was upon the first point, whether it were good in its creation: and that was (by *Vaughan*) divided into two questions.

1. Whether this was such a law as the king might dispense with?

2. Admitting that the king may dispense with particular persons, yet whether he may dispense with a corporation, when it is impossible for him to know the number, or the persons that are or may be of it?

*Ad primam* he held, that the king might dispense with it; and he said, that the distinction of *malum prohibitum* and *malum in se* was of little use, if not rightly understood; for every action in itself is good, and the evil of it is, that it is prohibited by some law, for sin is the transgression of a law (a). But he said,

Vaugh. 333.

[ \* 138 ]

1. That what we call *malum in se* is either that which the very term implies to be unlawful, as murder is unlawful killing, adultery is unlawful copulation; and these can by no law be made lawful, and much less can the king dispense with them; for such laws would certainly be void, because there is a contradiction in the very term; for it is impossible that murder, which is the unlawful killing of man, should be lawful, though a law might be made, that it should be lawful for such and such causes to take away the life of a man; which to do, as the law stands now, would be murder; and a law might be made, that she that is the wife of A. should be the wife of B. and then it would be no adultery for B. to lie with her.

A *malum in se* is that which the very term implies to be unlawful, and which cannot therefore be made lawful, without a contradiction. Vaugh. 336-7-9. Post, C. 398. Grotius de Jure, B. et P. lib. 1, cap. 1, § 10.

2. Another sort of *mala in se* are such as the law of the land doth admit to be prohibited *jure divino*; for these can by no human law be dispensed withal; for whatsoever may be made lawful by any human law is not *malum in se*.

Things admitted by the law of the land to be prohibited *jure divino* are *mala*

(a) On the distinction between a *malum in se* and *malum prohibitum*, see Vaugh. 334, &c. Post, p. 493. 2 Hawkins, P. C. c. 37, § 28. 1 Bl. Com. 54,

57, and 2 Bos. & Pull. 374-5. 3 Barn. & Ald. 183-4. 5 Id. 341. 2 Swanston, 161, n. 2 Stillingfleet's Eccles. Cases, 151, 165.

in se, and not  
capable of dis-  
pensation.  
Vaugh. 339.

*Ante*, p. 91.

(1) *Ante*, p.  
116. *Post*, p.  
493. The king  
may dispense  
with a law  
which gives no  
particular per-  
son an interest,  
but concerns one  
person as much  
as another.  
3 Inst. 236.  
4 Bl. Com. 398.  
*Post*, p. 493.  
Vaugh. 342.  
Bac. Abr. Pre-  
rogative, (D) 7.

[ \* 139 ]  
Vaugh. 343.

3 Inst. 194.  
Vaugh. 343.  
2 Hawk. c. 26,  
§ 64, and c. 37,  
§ 34.

(2) Vaugh.  
333, 339, 340.  
4 Bl. Com. 398.  
Grant of a dis-  
pensation to a  
corporation ag-  
gregate is good.  
Vaugh. 346, &c.

No dispensation  
is good in the  
case of simony  
or buying of  
offices. *Post*, p.  
493. Vaugh.  
354-5. Hardr.  
445.

The true difference, where the king may dispense, and where he may not, is not when it is *malum in se*, and when it is *malum prohibitum*; for there are some *mala prohibita* by statute that the king may dispense with, and others that he cannot; neither doth it make any difference when the law dispensed with is capital, or when it is less penal; for there are some capital laws that he may dispense with, as 3 Inst. 74. [Vaugh. 344.]

Neither is it any difference when it is *pro bono publico*, for every law is supposed to be so (1); but the true difference is, when the law gives any particular person an interest, and when it concerns no one person more than another; for there, in the first case, the king cannot dispense, but in the last he may, because he alone is injured; for though such a law be *pro bono subditorum*, yet it is not *singulorum*, but *populi complicati*, and no one can have an action, for as well every one may have an action.

The king cannot dispense with the laws of maintenance, forcible entries, carrying distresses out of the hundred, &c. the reason is not because they are *mala in se*, but because the party that is grieved hath by the law an action given him; for it is not *malum in se* to maintain a lawful suit, nor to enter forcibly where a man hath right, &c.

The king cannot dispense with any thing that is forbid by the statute *de pistoribus*, nor with the statute against \* mixing of wine, for there is a particular wrong to the buyer.

In case of a common informer, after action commenced, the king cannot dispense, because the beginning of the action doth attach an interest in the party, though the king might pardon it before action brought.

The king cannot dispense with the erecting a puzance in the highway (2), but as every particular man hath damage he may bring his action.

As to the second point, whether the king might dispense with a corporation, he held he might, and produced several precedents; and it is very usual to licence them to purchase in mortmain, to make parks, to convert arable into pasture, or wood into arable, to erect a fair, to appropriate a rectory, &c. and so concluded for the defendant.

In some cases he said the king could not dispense where no particular interest or action was given; as in case of simony, or buying of offices, &c. but that is because the persons there are under an absolute disability as if they were dead (b). [Judgment for the defendant, Vaugh. 359.]

(b) See the argument of Lord C. J. Herbert on the dispensing power, *post*, p. 492, and the note, *ibid*.

( C. 160. )

GILL v. RUSSELL Senior and RUSSELL Junior.

Continued from p. 63.

An infant and  
one of full age

DEBT upon an obligation to perform an award. Russell

junior pleads *Deins age*. Russell Senior pleads *Nullum fecerunt arbitrium*.

The plaintiff replies, and sets forth the award, and shews, that the defendant (a) was awarded to pay him 10*l.* such a time, (which he had not done), and that thereupon the two defendants were to give to the plaintiff good and sufficient releases; and after such releases given to the plaintiff, the plaintiff was to give releases to the defendant.

The defendant rejoins, that his co-obligor was within age at the time of submission, and at the time when the award was to be performed. The plaintiff demurs.

1. It was agreed, that if an infant and a man of full age seal an obligation, though this be voidable by the infant, yet it binds the other. 14 H. 4, 33. Bro. Obligation, 26, 77. Bro. Debt, 73, 76. And so if an award be made, that one of the parties and a stranger shall do such an act, it shall bind the party, though it be void as to the stranger.

And *Baldwin pro def'* cited a case of *Rudston v. Yates*, in Marsh. 111. Popham, 16, where an infant submitted himself, a third person was bound that he should perform the \* award; and it was adjudged that the submission was void, and consequently the arbitrament and the obligation.

But the Court seemed to deny that case; for though it be void as to the infant, yet the obligation is forfeited if he do not perform it: and *Vaughan* said, that no bond, &c. of an infant or feme coverte, or monk, is void, unless their incapacity appear in the deed, but only voidable. *Qu.* 1 Roll. 18(b).

And as for the giving of releases they said, that if the infant could not give such a release as was ordered, the obligation was forfeited; however, being it was awarded that the plaintiff should give a release, (though it were after such releases given by the defendants *ut supra*, which was impossible by reason of the infancy), yet it was an award of both parties(1). And so judgment was given for the plaintiff.

(a) The award is stated rather differently in p. 62.

(b) That the submission of an infant is voidable only and not void, see Sir W. Jo. 164. Comb. 318. 3 Lev. 17. Bac. Abr. Arbitrament, (C). 3 Viner, 110. But the bond of an infant with a penalty

is said to be void and not merely voidable; Buller's Ni. Pri. 182. Noy, 85. Bac. Ab. Void and Voidable, (B), and *vid.* 2 Hen. Black. 515; and the bond of a feme coverte or a monk absolutely void. 3 Burr. 1805. Com. Dig. Plead-er, 2 W. 18. 2 Camp. Rep. 272.

A., join in a bond to perform an award, and it is awarded that they or either of them shall pay 10*l.*, and that the plaintiff shall release to them after they have released to him. The bond is valid as to A. although voidable as to the infant, and the award good and mutual, although the infant cannot make a good release.

If an infant and man of full age seal an obligation, it is voidable as to

[ \* 140 ] the infant, and valid as to the other. *Ante*, C. 75 Latch. 207.

An award that one of the parties and a stranger shall do an act, is binding on the party, and void as to the stranger. *Ante*, C. 75.

(1) *Ante*, C. 62b.

### HALL v. NEWLAND.

( C. 161. )

J. S. SEISED of two acres of land adjoining together, in one of which there was a pool, upon the other he builds a house, and lays pipes to convey water from the pool to his house; afterwards the acre of land, wherein the pool was, was conveyed to the plaintiff, and the house, and the other acre of land whereupon it stood, came to the defendant, who, the pipes being stopped, came with carts and horses to fetch wa-

J. S. was seised of two contiguous acres of land, A. and B. In A. there was a pool, and on B. he built a house, and laid pipes to convey



water from the pool to the house. A. and B. having been separately alienated, it was held, that the alienee of B. had no right of way over A. to fetch water from the pool with carts and horses for the use of the house, when the pipes were stopped.

(1) 5 Taunt. 311.

[ \* 141 ]

ter from the pool to his house, for which the plaintiff brought an action of trespass; and this matter appearing upon the pleading, there was a demurrer.

*Barton* argued, that notwithstanding the acre, in which the pool was, was sold away, yet the fetching of water was, as it were, a liberty annexed to the house, and was not destroyed by the alienation of the acre and pool, although there was no special reservation of it, and although the house was newly built; and cited 2 Cro. 121. 11 H. 7, 25. Moor, 682. 2 Cro. 170. Hob. 131, and took a difference between an easement, which will not be extinguished by unity (1), and a profit *aprender*.

*Baldwin pro quer'* said, that this case differs much from the case cited in 2 Cro. 121, for that is of a conduit and pipes, which is *quodammodo* appendant to the house, and perhaps would remain notwithstanding the alienation of the land in which they are; but this is of fetching water in \* carts, which may possibly destroy the grass, and defeat the party of the profits of the land.

The Court seemed to incline strongly for the plaintiff, and gave judgment *nisi* (a).

(a) If the conveyance of the house was such as to pass to the alienee the use of the water flowing through the pipes, he might have entered upon A. for the purpose of repairing them. Cro. Jac. 121. Moor, 682. 1 Saunders, 321, 322 b, n. (6). Dougl. 748.

( C. 162. )

HILL v. GOOD.

Continued from p. 108.

JONES argued, that a prohibition ought to be granted for these reasons:

1. It is a marriage against the general prohibition, *Levit.* xviii. 6. "Thou shalt not approach to any that is near of kin."

2. The very same degree is forbid, *Levit.* xviii. 16: "Thou shalt not uncover the nakedness of thy brother's wife;" and the wife's sister is as near to the husband, as the husband's brother is to the wife: and the opinion of my Lord Coke, 2 Inst. 684, is, that those *in pari gradu* are prohibited, *quia eandem rationem propinquitatis habent*, &c. And although the brother were to take his brother's wife, and raise up seed to his brother, yet that is a particular exception, *et exceptio probat regulam in casibus non exceptis*.

Post, p. 154.

*Obj.* And whereas it is objected from the 18th verse, that the forbidding the taking of a wife to her sister to vex her in her lifetime, was a clear implication, that after her death it was lawful:

*Ans.* "Sister" there is intended any other woman, for it is used to signify any thing of a like nature, *Ezek.* xvi. "Sodom is thy sister," &c., and so this text is used against polygamy; and the contrary practice amongst the Jews is supposed to be by dispensation, for the multiplying of that nation. *Mal.* ii. 14.



3. The act of 32 H. 8, reciting the grievances by the pope's prohibiting those that were not prohibited by the law of God, instances in cousin-germans, which is a more remote degree than this.

4. That act doth not say that it shall be lawful for all to marry without the Levitical instances, but degrees; and so includes *parem gradum*.

5. It is prohibited by the apostolic canon.

6. By the *Illiberian* council held *anno* 310, Canon 16. *Vaugh.* 315.

7. By the canons *primo Jacobi*.

*Maynard pro quer'* argued that it was lawful.

1. Because it is none of the instances in the Levitical prohibitions.

\*2. This marriage is not *contra jus naturæ*, for Jacob [ \* 142 ] married two sisters, and was not reprov'd. *Post*, p. 154.

Our Saviour reproving plurality of wives tells them *ab initio non fuit sic*; but it cannot be said so here; and where it was lawful at first, and is not since prohibited, it is lawful still. And Grotius is not authority in the point, for his opinion is against the marriage of cousin-germans, which all allow to be lawful with us. And though the marriage of the sister be prohibited, *Levit.* xviii. 9. *Deut.* xxvii. 22, yet that is expressed to be a natural sister; and there is not a parity of reason. Besides, it was not intended that this should be extended farther than the letter; for the statute says, that the freedom allowed by the law of God ought to be most sure and certain; and if a parity of reason should be admitted, there would be no certainty.

And as for the canons alleged, that will not alter the case; *Post*, p. 171. for they cannot repeal an act of parliament. And he said, that the prohibition in the 18th verse cannot be intended of plurality of wives, for then it could not have been dispensed with; and we find that Moses did permit plurality of wives to the Jews; which he could not have done if it had been against the express law of God.

*Vaughan*, Chief Justice, desired them to take notice of three things.

1. This was a lawful marriage before the Levitical law (1). (1) *Acc. Vaugh.*

2. The general prohibition in the 6th verse will make nothing in the case; for by the same reason it may be extended *ad infinitum*; but that was it which gave the pope a colour to dispense as he did. 236-7.

3. That the Levitical law would not have bound us, if it had not been for the act of parliament. *Et sic adjournatur ad Term. Pasch.* [Continued, *post*, p. 152.] The Levitical law would not have bound us, but for an act of parliament. *Acc.* 2 *Vent.* 16, 20.

HILL v. BROWNE.

( C. 163. )

A. AND B. were bound in a bond to C. for the payment of A. & B. are bound to C. for

payment of money. A covenant by A. to save B. harmless from the bond, extends to a wrongful suit and recovery by C. against B. upon the bond.

[ \* 143 ]

*Vaughan, C. J. dissent.*

*Ante, C. 121, 146.*

*Post, C. 612.*

*6 Viner, 449.*

*Ante, C. 152.*

201. at a certain day. A. covenants with B. to save him harmless from the said bond. B. brings an action of covenant; and alleges for breach, that C. sued him in the Exchequer upon the said bond, and had judgment against him; but he doth not allege that A. did not pay the money at the day.

It was urged for the defendant, that for all appears, the money might be paid at the day; and then, though C. did sue B. and recover, yet it was no breach of the covenant, because the suit was tortious; and the covenant shall not be extended to save harmless from wrongs, and therefore he ought to have averred that the money was not paid at the day.

But on the other side it was said, that there is a great difference between a general covenant to save harmless (for that shall be intended only against lawful wrongs) and to save harmless against a particular person, for that is against tortious as well as rightful acts. *Hob. 35.* Besides, it cannot be intended that the money was paid when it is set forth that C. sued and recovered.

But *Vaughan*, Chief Justice, said, the books did generally make a difference between a general saving harmless, and when it is against a particular person; but he did conceive there was none at all; for the reason was the same in both, which is, that when a man is wronged, the law gives him his remedy, which holds as well against every body, as against a particular person: but the other Judges were of a contrary opinion, and gave judgment *pro quer'*, *Vaughan* being gone into parliament.

( C. 164. )

WARD v. SHARPE.

A writing will amount to a devise, if the intention sufficiently appear; although there be no technical words of devise. 2 Vern. 467.

Com. Dig. Devise, D. 1, 2.

(1) This was before the Stat. of Frauds.

J. H. being seised of Black Acre, lying sick, sent one for to draw notes in order to the making of his will; the words of the notes were, Black Acre to J. H. and his heirs; and after several parcels so devised, concludes, and he that hath my land, &c. shall be a butcher, and so dies, leaving no other will besides those notes (1). This being found by special verdict, it was argued by Serj. *Hard.* *pur le devise quer'* that this was a good devise of Black Acre, for these reasons:

1. When a man doth lie *in extremis*, he is *inops consilii*; and the law will make out his intentions without the usual words. *Moor, 31. Cro. Eliz. 31. Dyer, 72. 1 And. 7, 34.* He agreed, that if a man declared it to be his will that A. should have his lands, and another writes it without his consent, that this will not be good. *Cro. Eliz. 100. 3 Leon. 79.*

And here the testator did afterwards declare this to be his will, which amounts to a new publication. 44 Ed. 3, 33. 43 Ass. pl. 36. Dy. 142 b. *Cro. Eliz. 422, 493. Moor, 353, 404.*

[ \* 144 ] \* That lands shall pass in a will by their reputed names, as

rents and services by the name of a manor, &c. *Vide* 10 Co. 133. 3 Leon. 165. 2 Leon. 41, 120. Noy, 35. 3 Co. 20. Style, 301, 307, 319. 1 Roll. 611. 2 Cro. 104. 9 H. 6, 7.

*Turner pro def.*—Lands passed not by will at the common law, and it [*they*] ought not now to pass without sufficient writing and certain expression. 2 Inst. 111. Hob. 32.

And here this is altogether insensible, for here is no word to pass the estate, *scil.* "I give," or "will," or "bequeath;" and this is like the case of *Bowman* and *Bilbank*, Trin. 13 Car. 2, in B. R. where one Cauly being seised of a house in Newcastle, lying sick, and being asked how he would dispose of his estate, cried (2) "All to my mother, All to my mother," which was written in his lifetime, and yet resolved that nothing passed; and where the words are senseless nothing passeth. Style, 240. And if it be intended that he did think to reduce it to form, and put it in significative words, yet if he die before it is done, all is void; and in the case in Dy. 72, there the notes were reduced to a formal will before the deviser died. But to that it was answered by *Windham* and *Elkis*, that in the case in Dyer, the reducing the notes into a formal will (which was never read to the testator) made no alteration in the case, but there the lands passed by the notes.

(2) The words were, "I give all to my mother," &c. 1 Lev. 130. T. Ray. 97. *Vid.* 1 Bro. C. R. 437. 2 Show. 395-6.

Plow. 345.

And the Court said, although there were no words of will or devise, yet when he concludes, "He that hath my lands shall be a butcher," there the word "hath" did sufficiently declare his intention; and thereupon gave judgment for the plaintiff, *nisi*.

## DE TERM. PASCHÆ, 1674.

IN COMMUNI BANCO.

[ 145 ]

SMITH v. BURTON.

( C. 165. )

THE plaintiff declares, that he and all the occupiers of, &c. had used to have common in Black Acre, and that the defendant had a close next adjoining to the common, and that the fences were out of repair, and that he ought to repair them, but did not, whereby he durst not use his common for fear his cattle should trespass upon the defendant. Resolved, that it was no good cause of action; for if his cattle had trespassed upon him through his own bounds, he might have justified (a). Another exception taken to the declaration was, because he hath not entitled himself to the common; for a man cannot prescribe in occupiers for common; but that the occupiers have used to repair the fences is good enough, *per Vaughan* (b). But, *per Baldwin*, Serj. it was adjudged in the King's Bench, that to prescribe for common in the occupiers is good enough; because a lessee for years,

A commoner cannot bring an action on the Case against the owner of a close contiguous to the common, for not repairing his fences, whereby the plaintiff was afraid to use the common, lest his cattle should trespass on the defendant's close. Brownlow Red. 62. F.N.B. 128. (297 in the quarto edit.)

(a) Lutw. 1357. Winch. 996. (b) Com. Dig. Pleader. 8 M. 22. 3 Term Rep. 766.

that ought to have common, may come to his estate under so many assignments, that he may not be able to know where the fee is to make his prescription. But for the first reason judgment was arrested (c).

(c) In an action on the Case for the disturbance of the plaintiff's right of common, it is unnecessary to state any title to the common by prescription or otherwise, but merely to allege a possession of land by the plaintiff, and a right of

common by reason thereof. But it is otherwise in a plea of justification by a commoner, or an avowry damage feasant. 2 Ld. Ray. 1230. 8 Term Rep. 718, and the notes to *Mellor v. Spateman*, 1 Saund. 346. 2 Saund. 113 b. n.

[ 146 ]

( C. 166. )

Whether a repugnant date, laid under a *scilicet*, may be rejected? Cro. Jac. 311.

## MEXTON v. BRAND.

THE plaintiff declares of a lease made the 10th of January, *habend' a primo Jan'*, by virtue whereof he entered, and that the defendant *postea, scil. primo Jan'*, ejected him.

It was moved by *Maynard* in arrest of judgment, that the declaration is repugnant, because the ejectment is laid before the lease made; for the lease is made the 10th of January and the ejectment laid the first; but the question is, if the *Scilicet*, being repugnant, be not void (a); and he cited 2 Cro. 96. Cro. Eliz. 702. Yelv. 93. *Adjournatur*.

(a) That it is void, see 1 Salk. 325. Gilb. Com. Pleas, 131-2. Com. Dig. Plead. C. 28. 5 East, 255. Buller, N. P. 106.

( C. 167. )

## CARTER v. WEST.

A declaration in ejectment with a joint demise by two persons, without a surname to one of them, is bad for uncertainty. Co. Lit. 3 a. Bac. Ab. Grants, (C). 9 Vin. 347.

THE plaintiff declares, that *Frances Ford et Elizabetha dimiserunt*, and put no surname to *Elizabetha*. And after a verdict for the plaintiff, it was moved in arrest of judgment, that this declaration was altogether uncertain; because here was a joint demise declared upon, and no surname to one of the parties.

It was objected, that *Elizabetha*, without a surname, should be as if she had not been named, and so it should be intended to be all demised by *Frances*.

But it was answered, that declaring upon a joint demise, he must derive the title from them both, and if this should be admitted, here would be a wrong to *Elizabeth*; for *Frances* would recover the whole (1), and the tenant must be tenant to her only. And *per tot' Cur'* it is naught for the uncertainty; and therefore judgment was arrested.

It was said to have been often adjudged, that if a letter of attorney be made to J. S. and Thomas, without a surname, it is void.

(1) *Vid.* 12 East, 39. 3 Taunt. 120. 3 Camp. 190

A letter of attorney to J. S. and Thomas, without a surname, is void. 1 Rol. 289. Cro. El. 153.

( C. 168. )

## WITTERONG v. BLANY.—In C. B.

Continued from p. 110.

Whether a *sci. fa.* against tenants issues into Wales?

THE question was, whether a *Sci. fa.* would go against tenants into Wales? And in order to the explaining of the law in this case, it was observed by *Vaughan*, Ch. J. that

the conquest of Wales was not till 12 Ed. 1, and before that time it was certain the Courts of Westminster had no jurisdiction to reach thither: and then there was an \* absolute submission *de alto et basso* (1) to the jurisdiction of the Crown of England; and by the statute of Rutland (a), (not printed), it was incorporated to England, and then they were subject to laws made by the parliament of England, but not unless they were particularly named (2); and by the statute of Rutland king Edward I. had power to alter their laws, but that power was personal to him (3), and did not extend to his successors; but none of all this gave power to the Courts of Westminster to send process into Wales.

The next statute considerable is 27 H. 8, 26, which unites Wales to England, and enacts that lands shall descend, &c. by the laws of England.

And since that time Wales is bound by the laws of England without particularly naming of it, though the custom be generally particularly to name it: by that statute it was divided into counties, and divers lordships marchers were by it united to English counties, as Monmouth, &c. and these are in all respects English counties, and writs go there as to any other parts. But for the other Courts he takes notice, that by reason of their remoteness it was inconvenient for them to attend the Courts at Westminster.

The old books do occasion many mistakes, because they take no distinction between the lordships marchers and the principality of Wales; whereas 18 Ed. 2. Fitz. Assi. 382, it is said to be ordained by act of parliament, that if any question did arise upon the lordships marchers, it should be tried in the next county (b).

In *Calvin's* case it appears, that the king may send his *Brevia mandatoria* into any part of his dominions, but it is not so of *Brevia remedialia* (c).

(a) The *statutum Wallie*, 12 Ed. 1, made at Rothelan or Rhudblan in Flintshire, is not to be confounded with the statute of Rutland, 10 Ed. 1. The error in 1 Bl. Com. is noticed in the edition by Christian, and possibly originated in the report of Vaughan's Argument, Vaugh. p. 399. See Barrington's Obs. p. 115, 120. 5th edit. Whether this be an act of parliament or not, see Vaugh. 399, 414, 415. Barrington's Obs. 120. Hargr. Law Tracts, 391. *Campbell v. Hall*, Cowp. 210, and the remarks upon the last case in the 2d vol. of the Canadian Freeholder.

(b) See Vaugh. 403-4, 408-9. The notion of a lost act, which originally gave birth to the jurisdiction of the English Courts in Wales, has been treated as unfounded. *R. v. Cowle*, 2 Burr. 853. *Goodright v. Williams*, 2 Mau. & Sel. 274-5. *R. v. Athos*, 8 Mod. 140-5.

But see Hargr. Law Tracts, 390. That the trial in the next English county is at common law, see *R. v. Cowle*, ubi supra, p. 859. Gilb. C. P. 88, 2d edit. Hardr. 66, 120. Moor, 70. Bro. Cinque Ports, pl. 8. *R. v. Harris*, 3 Burr. 1333. 2 Sal. 651. Com. Dig. Action, N. 2.

(c) On this distinction of writs, see Vaugh. 401, 290. Style Pr. Reg. 656-7. Moor, 804. *Anon.* 1 Vent. 357. Writs, not ministerially directed, (sometimes called Prerogative Writs because they are supposed to issue on the part of the king), such as writs of mandamus, prohibition, habeas corpus, certiorari, &c. may, upon a proper cause, issue to every dominion of the Crown of England. But to foreign dominions which belong to a prince who succeeds to the throne of England, as Scotland or the Electorate, the Court of K. B. have no power to send any writ of any kind. Nor will they exert

1 Roll. 133.

[ \* 147 ]

(1) Vaugh. 399. Barrington's Observ. p. 123, n. 5th edit.

(2) Vaugh. 400, 415.

(3) Vaugh. 403.

Vaugh. 414.

Plowd. 123-9.

Since 27 Hen. 8, laws made in England extend to Wales without naming it. Vaugh. 415. Vid. Barrington's Obs. p. 160, n. (o).

Vaugh. 413. Hargr. Law Tr. 396. Theloal. Dig. lib. 7, c. 2. Com. Dig. Action, N. 2. Cro. Car. 445.

The King's mandatory writs, not remedial, issue into every part of the dominion of the crown.



Error lies upon a judgment given in any part of the dominions of the crown. Vaugh. 290, 402. Com. Dig. Pleader, 3 B. 3. 9 Viner, 482, 483, 484. Show. P. C. 32, 79.

The counties palatine distinguished from Wales. Vaugh. 418. 4 Inst. 223. 1 Salk. 146.

[ \* 148 ]

A writ of error will lie of a judgment given in any place in the king's dominions, and so it may be a *Cap. Utlagatum*; and they did formerly go to Gascoigne, Guien, Callis, &c. for it would be strange, if a man should be outlawed, and hide himself in the king's dominions, and that the king should not have power to reach him; but he said these must not issue out of Westminster-Hall to the sheriff or other inferior officer of the place, but must be granted by the king upon a special address made to him, and directed to him that has the chief command under him (*d*).

And this case differs much from counties palatine, because they were once part of and derived out of England; but it will not follow that the laws shall extend to Wales, or Ireland, in the same manner as they do to these; for there the subject had once a right of action, which cannot be taken \*from him by the king's grant; and so it is of the cinque ports, which were once part of the kingdom as the counties palatine (*e*). [Continued, *post*, p. 173.]

the power, even in cases where they have it, when they cannot judge of the cause, or administer relief upon it. *Per* Mansfield in *R. v. Cowle*, 2 Burr. 855, 856.

(*d*) As to a *capias utlagatum* into Wales, see Vaugh. 397, 414. 1 Edw. 6, cap. 10. 2 Mod. 13. Com. Dig. Wales, B. 2. "If a man be outlawed in England and flee into Ireland, no *cap. utlag.* can follow him thither." *Carteret v. Petty*, cited from the Nottingham MSS. in 2 Swanston Rep. 324. Lord Vaughan says, that perhaps by a special mandatory writ from the king to his chief officer the judgment of an English Court may be executed in any part of the English dominions. Vaugh. 419, 420. Registr. Brevium Judicial. f. 43, B. But not otherwise, see *Coot v. Linch*, 1 Ld. Raym. 427. Show. P. C. 57. *Carteret v. Petty*, *supra*. Vaugh. 398.

(*e*) That the judgments of the king's Courts may be executed in counties palatine and the cinque ports, see Vaugh.

418. *Alder v. Puisy*, *ante*, p. 12. 4 Inst. 223. 1 Lev. 256. T. Ray. 206. 2 Saund. 194. 7 Taunt. 233. Com. Dig. Franchises, E. 3. Hargr. Law Tracts, p. 113. The observations of Vaughan, C. J. in the above report seem to contain the substance of the argument printed at the end of his reports from notes "intended to be methodized" for delivery in Court, see Vaugh. 395, in *margine*. They were adopted by counsel in the case of *Lamley v. Thomas*, 1 Wilson, 193, and form the groundwork of the "Discourse against the jurisdiction of the King's Bench over Wales by process of *latitat*" in Hargrave's Tracts, p. 377. The author of this latter treatise was the late Lord Camden, see Butler's Reminiscences, p. 141, 3rd edition. On the jurisdiction over Wales, see further, *R. v. Athos*, 8 Mod. 136. *R. v. Cowle*, 2 Burr. 850, &c. 4 Evans's Coll. Stat. 75, note. Com. Dig. and Viner, tit. Wales.

## ( C. 169. )

## MARSHALL v. WISDALE.

Rent is reserved in a lease "without deduction, in respect of parish duties, dues, taxes, &c. made or to be made, &c." A subsequent Act imposes a tax to be paid by land-

THE plaintiff demised unto the defendant a house, yielding and paying 10*l.* yearly, without any deduction or abatement of the rent for or in respect of any hearth-money, parish duties, dues, taxes and assessments, which are already had, made, rated, taxed or assessed, or to be had, made, rated, taxed or assessed at any time during the said term upon the plaintiff by reason of the said house; (and then the act of parliament that gives the last tax is made, whereby it is enacted, that the landlord shall pay the tax; but there is a pro-



viso, that it shall not extend to discharge any covenants or agreements made between landlords and tenants).

The tenant pleads a tender of 9*l.* and that the other 20*s.* was paid to the tax, (which by the act the tenant hath power to deduct).

1. And it was argued by *Goodfellow* for the plaintiff, that this express agreement of the defendant to pay all taxes shall not be changed by his implicit assent in parliament; and for that purpose he cited Dy. 48, 52, and 17 Ed. 4, 5, 6, where a man shall not be relieved in such a case against his express agreement; and farther cited a case of *Haselfoot* and *B. Bond*, where it was adjudged in the King's Bench, 1656, Mich. Term, that such a covenant was not discharged.

But here is an express proviso in this act, that it shall not extend to discharge covenants and agreements between lessor and lessee.

2. Another objection against the plea was, because he pleads a tender, and doth not plead it at the place where the rent was agreed to be paid; and to that cited 4 Co. 70. 22 H. 6, 36. Dy. 300, 150.

*Wilmot pro def'* said, that the word parish shall extend to dues, duties, &c. and it shall not be intended of extraordinary charges laid by parliament; and he said parish *est verbum gubernans*, and for the restriction of grants cited Fitz. Ass. 371. Bract. 47. Fitz. Feoffment and Facts, 94.

*Per Atkins*, Just.—If he had said taxes ordinary and extraordinary, and granted or imposed, or to be granted or imposed, it would have been more clear, for that would have properly extended to parliamentary taxes.

*Ellis*, Just.—If the words do not extend to parliamentary taxes, they can have no signification; for hearth-money and parish-duties, &c. are to be paid by the tenant without such a covenant.

But as to that point, whether or no this covenant was dispensed with by the act of parliament, they delivered no opinion; because they all agreed, that as the tender was pleaded it was naught; for being to be made at a certain place, it could not be properly made any where else; and upon that point judgment was given for the plaintiff.

lords with a proviso saving covenants between landlords and tenants: *Quare*, whether the tenant may deduct payments made under the act? 1 Ld. Ray. 320. 11 Mod. 340. Vin. Ab. Taxes, D. 11 East, 165.

Meaning of taxes ordinary and extraordinary. 11 Mod. [ \* 149 ] 239.

1 Salk. 221. 2 Salk. 615. 1 Ld. Ray. 318. Carth. 135. 8 Mod. 314.

A tender of rent must be pleaded to have been made at the place appointed for payment. Co. Lit. 210. Bac. A. Tender, (C).

### LEEFE v. SALTINGTON.—In C. B.

S. C. 2 Lev. 104. 1 Mod. 189. Carter, 232.

SIR RIC. SALTINGTON being seised in fee of a farm, called W. Farm, devised to his wife in these words:

"And as for W. Farm, I will and bequeath it to my wife during her life, and by her to be disposed of to such of my children as she shall think fit."

Sir Richard dies, leaving issue Richard and Philip; his wife enters, and makes a disposal of it to Philip the younger son and his heirs; Philip enters and dies, his heir enters; Richard brings ejectment.

See marginal abstract, post, p. 176.

(C. 170.)

Two questions.—1. What estate passed to the wife by this devise?

*Post*, p. 163, 176. And it was agreed on both hands, that she had but an estate for life in point of interest.

But *Scroggs pro def'* argued, that she had a power to dispose of the fee after her death, and for that cited 19 H. 8, 10. Moor, 57. Latch, 9, 19, 134.

*Post*, p. 176. *Waller pro quer'* agreed that she had but an estate for life; for where there is an estate expressed, the law shall carry nothing by implication; and for that cited Dy. 26 b. Moor, 593. N° 803.

*Post*, p. 177. But the great question was, what estate she should have power to dispose of? And he held, she could dispose of no more than an estate for life; and his chief reason was, because, if the testator himself had in his will said, "I dispose of W. Farm to Philip," he should have had but an estate for life; for words that disinherit an heir ought to be clear, as it is held Cro. Car. 639. [*Post*, p. 164. *Ante*, p. 11.]

The cases by him cited were Bro. Estate, 78. 6 Co. 16. Moor, 852. 1 Roll. 834. Cro. Eliz. 52, 53. 1 Leon. 224.

[ \* 150 ] \* And this, he said, differs from the case of *Daniel* and *Upton* in Latch, for there it was to dispose of at will and pleasure.

*Post*, p. 177. If a man do *disponere, dare et vendere* such a farm, it shall be intended an estate in fee; but if it be *dare* only, it is for life. Moor, 103, 303. 2 Roll. 784. *Adjournatur*. [Continued, *post*, p. 163.]

( C. 171. )

*Semb. S. C. Brooking v. Jennings*, 1 Mod. 174.

If an executor *durante minore ætate* has duly administered the assets, and paid over the surplus to the executor of full age, he is not chargeable to creditors: and he may shew this matter under a general plea of *plene administravit*.

*Ante*, p. 13, note (a). DEBT upon a bond of 500*l.* against an executor *durante minore ætate*. An executor *durante minore ætate* of A. being sued, pleads *Plene administravit*. And upon a special verdict the case was, that he had paid several debts upon contract and legacies; and for the rest of the goods he had paid and delivered them to A. who was come of full age; and it was also found, that the testator's personal estate, which he had in his hands, was of the value of 2000*l.* that he had paid 1000*l.* in debts and legacies, and that he had accounted with A. and had paid to him 92*l.*

1. The Court did seem to agree, that if an executor *durante minore ætate* do pay debts as an executor ought to do, and for what remains in his hands, if he account for it, and deliver it over to the heir, [*executor?*], that he shall not be chargeable to any of the creditors.

If an executor *durante minore ætate* commits a *devastavit*, and obtains a release from the executor, when of full age, yet he 2. Three Justices did seem to agree, that if an executor *durante minore ætate* commits a *devastavit*, and then obtains a release from the heir, [*executor?*], being come of age, that this will not secure him against the creditors, who had once a right of action attached in them, which shall not be divested by his release; for perhaps he may be worth nothing, and so the creditors will be without remedy.

But *Vaughan* *dubitavit*, because when the heir [*executor*?] remains liable to creditors (a). being come of age releaseth, (if the executor *durante minore ætate* had wasted), he himself becomes liable for the value.

But here they agreed could be no *devastavit*, though legacies were paid before debts upon bond, because the estate of the testator was sufficient to pay all. It is no waste to pay legacies before debts, where the estate is sufficient to pay all.

*Atkins*, Just. questioned whether this matter might be given in evidence upon a *Plene administravit*, or whether he should not have pleaded the special matter.

But to that it was answered by *Vaughan*, *nemine contradicente*, that he always took it for a general rule, that when an executor or administrator had done what they ought to do, they may plead *Plene administravit*, and give the special matter in evidence; but when judgments are due, and bonds \*sued, they cannot give that in evidence, but must plead it, because the goods to satisfy are in their own hands, and so not properly administered, though liable to the judgment. [ \* 151 ] Whenever an executor or administrator has done what he ought to do, and has no goods in his hands to be administered, he may plead *plene administravit*.

*Baldwin pro def* cited 2 Brownl. 144. Hob. 266. 1 Rolle, 921. *Semb.* But when he has assets which are liable to higher creditors, he must plead specially (b).

(a) *Dissent. Vaughan*, C. J. see *S. C.* 1 Mod. 175. and see *Packman's case*, 6 Co. Latch, 160. Noy, 86. Sid. 57. 1 Keb. 114, 157. Hob. 265-6. Bull. Ni. Pri. 144-5. Com. Dig. Pleader, 2 D. 11. But see Bac. Ab. Executors and Administrators, (B) 2. Com. Dig. Administration, F. 3 Atk. 604. (b) 1 Mod. 174. 3 Lev. 114. 1 Wms. Saund. 333 a. n. (8).

### PARSONS v. MAYESDEN.

(C. 172.)

*Semb. S. C. Parten v. Baseden*, 1 Mod. 213. *Vid.* 11 Viner, 220.

THE case was, B. is made executor, and after the testator's death he takes several of the goods of the testator into his hands, which he pleads he did *pro salva custodia* of them; and then before action brought he refuses the executorship before the ordinary; whereupon administration is granted to C.; also before action brought he delivers these goods over to C.; and all this appeared upon the pleading. The question was, whether this taking of the goods into his hand be not such an administering as should conclude him afterwards to refuse. An executor takes goods of the testator for safe custody only: *quære*, whether this act will preclude him from afterwards refusing before the ordinary (a)?

1. And it was argued by *Jones*, that it should: and first he held, that when an executor hath once administered, he cannot afterwards refuse, but shall be still liable to the creditors for the goods that were in his hands, notwithstanding the ordinary grants administration to another; *quod non fuit negatum*; and for that he cited 9 Ed. 4, 33, 47. Bro. Exec. 90. 9 Co. 37 b. Plow. 280. 36 H. 6, 7. When an executor has administered he can no longer refuse, but is liable to creditors, although administration be granted to another (b).

2 *Quæst.* Whether this shall be such an administration as he cannot after refuse? And first he agreed that in some cases a man may meddle with the goods of the testator, and yet shall not be an executor by it. Cases in which a man may intermeddle without becoming an executor.

(a) *Vid.* Noy's Max. 102-3. Godolph. Touch. 488. 11 Viner, 209. *Ante*, p. 13. 93, 94, 101. Wentw. Executors, 173. (b) 1 Mod. 214. Wentw. Executors, 2 BL Com. 507. 2 Brownl. 187. Shep. p. 39. Fonbl. Eq. B. 4, P. 2, c. 1, § 3.

1. As to pay funeral charges. 21 Ed. 4, 5. 21 H. 6, 20. Dy. 256 a. 20 H. 7, 5 (c).

(1) Wentw. 173. Dy. 166.

2. To meddle with the goods by virtue of letters *ad colligend'* from the ordinary. 10 H. 7, 15, 28 (1).

(2) Wentw. 173-5. 5 B. & A. 744.

3. When a man is made executor by a will, which is after revoked, and meddles by virtue of that will. Dy. 166, 167 (2).

(3) *Hall v. Elliot*, Peake, 86. 2 Term Rep. 97.

4. *Per Serj. Hard.*—Taking them as servant to another. 38 Ed. 3, 20. Cro. Eliz, 858 (3).

5. Meddling with goods as supervisor or coadjutor. Dy. 166. Swinb. 6 Pt. 93, 94.

But here *Jones* said, when he takes the goods generally, being named executor, it shall be intended that he takes them as executor. 8 H. 6, 36. 20 H. 6, 1 b. 11 H. 4, 83. 21 Ed. 4, 5. Cro. Eliz. 810.

[ \*152 ]  
*Post*, C. 288.  
2 Term R. 100.

\*And when a man hath once made himself executor of his own wrong, by meddling with goods, though administration be afterwards granted to himself, or to another, it shall never be in his power to purge the wrong. Cro. Eliz. 102, 565. 5 Co. 33.

And the right of an executor in the testator's goods is by reason of the testament, and not of the probate; and therefore, when being named executor he takes goods into his hands, the law shall construe it in him as executor.

(4) Godol. 93. Noy's Max. p. 102-3.

*Hard. pro def.*—When it appears upon the pleading that he took them *pro salva custodia*, and so admitted by the demurrer, this is *opus charitatis* (4) to preserve the testator's estate; and the law will construe actions according to the intention of the parties. 21 H. 7, 13. 20 H. 7, 2. Fitz. Joind. en aid, 10. He admitted that a general taking would have amounted unto an administration. 5 Co. 33 b. 21 Ed. 4, 5.

Where a person, named executor, takes the testator's goods generally, it shall be intended to be an administration.

*Post*, C. 282.

(5) 2 Term Rep. 587.

Or where a man takes without any just right; as,

1. By a commission *ad vendendum*, for the ordinary can grant none such. Dy. 255, 256.

2. By virtue of a fraudulent gift (5). 13 H. 4, 6, 8. But when he takes to keep them safe, it is a work of charity, and there is no difference when the taking is by an executor and when by another (d). 1 Leon. 154. Cro. Eliz. 630, 858. Yelv. 184. 2 Cro. 25. 3 Bulst. 120. 1 Bulst. 176.

(c) Wentw. Executors, 173-4. Godol. 94. Carth. 104. Skin. 274. 18 Ves. 296.

(d) Those acts of administration which in an executor amount to an acceptance of the office and preclude him from afterwards refusing it, will, in the case of a stranger, make him an executor *de son tort*. Godolph. O. Leg. 100. Shep. Touchstone, p. 467. Bac. Abr. Executors, (E), 10, 2 Vol. 406, 5th edit. *Sed vid.* Wentworth Exors. p. 41. The acts are in general similar to those which in the Roman law amounted to a *gestio pro herede* and implied an irrevocable engagement on the part of the heir to accept the succession. Dig. Lib. 29, tit. 2. Domat's Civ. Law, P. 2, B. 1, tit. 3, § 1, &c. Godolph. O. L. 100-1.

The doctrine however in that law appears to have applied only to acts of intermeddling by persons who were otherwise entitled to succeed, and with this limitation it still prevails in Scotland in the succession to *heritable* rights. Ersk. Inst. B. 3, t. 8, § 38. and t. 9, § 25. Mackenzie's Instit. 207. With respect to *moveables* the law of that country, as with us, extends the rule to the case of *Vicious intromission* by strangers; having for its object the security of creditors, and protecting by its penal consequences a species of property naturally more exposed to fraudulent appropriation by strangers than heritable estates. Ersk. B. 3, t. 9, § 25. Mackenzie, 222. But an intromission *custodia causa*, will

The Court seemed to make a difference when goods are in the house of the person named executor; this possession shall not amount to an administration; but perhaps there may be a difference when he takes them into his possession.

And here, although it was pleaded that he took the goods by the consent of the party to whom administration was afterwards granted, that signified nothing, being before administration granted. *Adjournatur.*

Where the goods of the deceased happen to be in the house of the executor, such possession does not amount to an administration: *secus*, where he takes them into his possession.

*Samb. Swinh. 339. Godolph. 93.* It is no defence that the goods were taken by consent of the person to whom administration was afterwards granted.

not render the party chargeable; agreeably to the civil law. *Ersk. B. 3, t. 9, § 26. Dig. Lib. 29, t. 2, l. 20, § 1.* By the modern practice of the Scotch Courts, the small value of the thing meddled with excuses the intromitter, (*Ersk. ibid.*) although it was formerly otherwise. *Mackenz. 222.* [The reader will probably recollect a curious argument, containing comments upon this change of practice, dictated by the late Dr. John-

son, and to be found in Boswell's life of him; *sub an. Dom. 1772.*] In England, smallness of value is no defence at law: if therefore on a plea of *ne unques executor* the slightest act of intermeddling be proved, the defendant becomes chargeable with the whole debt *de bonis propriis*. *Noy, 69. Wentw. Exors. 180. Padget v. Priest, 2 Term Rep. 100.* But perhaps he may have relief in equity. *Robinson v. Bell, 2 Vernon, 147-8.*

### HILL v. GOOD.

Continued from p. 142.

( C. 173. )

THE only question was, whether the marriage of the wife's sister was prohibited by the Levitical law within the statute 32 H. 8, 38. And this Term it was argued by the civilians, viz. Dr. *Baldwin pro def'*, and Dr. *Pinfold pro quer'*.

Dr. *Baldwin*.—The statutes that concern this matter are 25 H. 8, 22, and in that statute it is expressly prohibited; and so it is in 28 H. 8, 7.

\* Then comes the statute of 32 H. 8, 38, which makes all [ \* 153 ] marriages lawful not prohibited by the Levitical law.

But that statute, as to that part which concerns pre-contracts, is repealed by the statute of 2 & 3 Ed. 6, 23.

And the other part is repealed by the stat. of 1 & 2 Phil. & Mar. 8. *Post, p. 171.*

But that is revived again *per* 1 Eliz. 1.

And he said,

1. This statute doth not say that none shall be prohibited but those that are expressly named there, or in the Levitical instances; but none shall be impeached that are without the Levitical degrees.

2. The reason of the prohibition in the statute seems to be grounded upon the nearness or propinquity, because the husband and wife are one flesh; and the very same degree being prohibited, viz. the husband's brother; and for that reason Zeper. de lege Mosaica, *Ubi par gradus eademque ratio, ibi eadem prohibitio similisq; constitutio.*

1 Bl. Com. 435, note (2), by Christian.

And this statute hath been extended to a parity of degrees.

1. Because the reason of the prohibition being propinqui-



ty, where there is the same propinquity, there is the same prohibition; and so is Grot. de jure Belli, &c. lib. 2, cap. 5; and Calvin in his commentaries upon chapter cxcvi.; and so Snedwinus.

2. It hath been the opinion of all people, that *Nuptiæ in linea ascendente vel descendente in infinitum prohibentur*; and yet the grandfather or grandmother are not expressed in the chapter.

*Procul hinc nati, procul este parentes.*

3. If none but those that are expressed were forbidden, a woman might marry any body (for all the prohibitions are to the man) but yet women are punishable by the practice of all places. Seld. de jur. Nat. 599. 2 Inst. 683, 684. Zeper. lib. 4, cap. 90, in Explic. leg. Mosaic.

4. Nearness of kin and confusion are the reasons given by God himself; and then this should be within it; for,

1. Here is the nearest affinity.

2. More remote degrees of affinity are prohibited, and by consequence this; as the law of Rome, that disables any man born within a mile of Rome to be Prætor, disables him that is born within half a mile.

3. Here will be the greatest confusion.

1. Between the persons themselves, as they will be husband and wife, and brother and sister.

[ \* 154 ] \* 2. In relation to their children, the same person will be father and uncle.

3. In relation to the children to each other, they will be brothers or sisters and cousins.

1. By the table of degrees set forth in archbishop Parker's time, 6 Eliz. it is expressly forbid, and so it is Convocat. 1 Jac. Can. 99.

2. It is prohibited by the Jewish Rabbins, Seld. Ux. Hebr. lib. 1, cap. 5, and in Maimonides & Philopid. by all which it is held unlawful.

3. It is unlawful by the civil law. Jac. Gotofred. Romanarum & Mosaicarum legum Collatio.

4. By the canon law. Zan. de Sponsalib. lib. 4, cap. 1.

5. By the most sober and wise pagans; as Tarquinius Superbus was censured for marrying his wife's sister.

*Ante*, p. 141.

*Obj.* The 18th verse of the xviii. chapter forbids the taking two sisters *simul*, which is an implication that it is lawful *successive*.

*Ans.* This inference is sophistical, and the *Caræi* are against it; and so is Basil, Epist. 197, where he says, this way of arguing is as if, because it is said, that Joseph did not know his wife Mary before she conceived, therefore he did afterwards; and because it is said, "Remember thy Creator in the days of thy youth," therefore thou needest not do it when thou art old.

But besides, the vexing in the text is not the sole reason of the prohibition, but the uncovering his wife's nakedness, *scil. revelatio turpitudinis*, which is used by Moses all along



for an incestuous copulation; and uncovering her nakedness, in that sense, may be as well after her death as before.

*Obj.* It was practised by Jacob.

*Ans.* All practices of pious men are not pious.

*Obj.* This is a judicial law and superseded, Deut. xxv. 5, but only to those to whom it was municipal.

*Ans.* This was a law from the beginning; and if it had been superseded, John the Baptist, that knew Christ was come, would not have reprov'd Herod so severely, and have defended it *usque ad sanguinem*.

And the husband's brother is prohibited to the wife; and this is in the same degree of propinquity; for to say this is farther, would be to say it is farther from York to London, than from London to York.

Dr. *Pinfold pro quer.*—By the prime law of nature brothers and sisters might have married, and did do so; and whereas \*it is objected, that was from the necessity of it [ \* 155 ] then, because there were no other persons; I answer, that they did it after the necessity ceased; and if it had been unlawful, God would not have made it necessary, for he could as easily have created two hundred as two.

He instances the Story of Abraham and Thamar. And Vaugh. 222-6. only the ascendants and descendants *in linea recta* were originally forbid; and if consanguinity was not forbid, much less affinity.

*Obj.* It is forbid, that none shall approach to any that is near of kin to him.

*Ans.* That imports nothing but with relation to the following instances; but if it imports any thing of itself, it must be such a nearness as there is none intervening; as father or son, or brother, &c.

*Obj.* Marrying the brother's wife is prohibited.

*Ans.* That law was dispensed with, and not only so, but in some cases commanded.

This law was made to prevent jealousies and fears; and if construction should be made by implication, these jealousies would be rather increased, as some have construed twenty several persons prohibited by implication that are not named.

In all negative laws, this is an aphorism, *Quod lege prohibitoria non vetitum est, permitti intelligitur*.

And in other cases it is not extended by parity; as to marry the brother's daughter was allowed by learned men, but not for the sister to marry the brother's son. *Ulpian*.

There would have been no need of expressing so many particularly, if a construction by parity had been intended, for several are mentioned that are *in pari gradu*.

The prohibition in the 18th verse was not intended to forbid polygamy absolutely, but the taking the wife's sister in her lifetime, which implies, that after his wife's death it might be lawful. Selden de Jur. Nat. lib. 5, cap. 10.

In the apostolical canons, the 16th, it is forbid to a priest

or a bishop to marry his wife's sister, which implies, that it was esteemed lawful for laymen, for they were under greater restrictions than the laity.

Vaugh. 245-6.

In the old civil law, in the whole Digest, it is not forbid; for they prohibit only those that are *loco parentum* or *loco liberorum*. *Vide* Bruen' de jure Connubiorum, 2 lib. cap. 15.

*Honorius* the emperor married two sisters successively.

[ \* 156 ]

\* And in the case of *Nicholas de Vanderdous* (in the Low Countries, one of the States), it was held lawful. *Curia advisare vult*. [Continued, *post*, p. 167.]

( C. 174. )

KING v. GOGLE.—In C. B.

In debt on bond conditioned for the performance of covenants in another indenture, a plea of performance must make *profert* of the indenture. 1 Saund. 9. 2 Saund. 410, n. (2). Carth. 5. And after such a plea, a rejoinder, shewing an excuse of performance, is a departure. 1 Saund. 117 a. n. (3). 2 Saund. 84, and notes, *ibid.* Com. Dig. Pleader, F. 7. Willes, 25.

DEBT upon a bond. The defendant pleads, that it was conditioned for performance of covenants in indentures; and pleads performance.

The plaintiff replies, that one covenant was to pay so much money as should be taxed by the Judge of the Spiritual Court.

The defendant rejoins, that the Judge taxed nothing at all.

The plaintiff demurs.

*Obj.* 1. The defendant pleads performance of covenants (contained in indentures) to discharge himself of the bond, and doth not say, *Hic in Curia prolat'*, which he ought to do; as appears by 10 Co. 94. Hob. 233. 28 H. 6, 7. Bro. Monstrans de Faits, 9; and in 5 Co. 20 b. *Styles's* case, it is so pleaded. 6 Co. *Bellamy's* case.

But it was said by *Holloway*, that it was good, without shewing the deed, because here the defendant claims no interest; and so it has been held 6 Ed. 4, 2. 6 H. 7, 12, 13. 13 H. 7, 18.

But at last the Court seemed to hold that it was ill; for the plaintiff could not properly shew the deed; and unless the deed be shewed, how can the Court judge of the covenants (a)?

When a party claims a thing which cannot commence without deed, he must shew it. *Secus*, if he claims only part of the thing so granted.

But it was said, that where a man claims a thing that cannot have commencement without deed, he ought to shew the original deed; but otherwise if he claims but part of the thing; as if a rent-charge of 20*l.* *per ann.* be granted, and the grantee grants 10*l.* of it to another; the second grantee need not shew the deed, because it shall not be presumed to belong to him; but otherwise if he had been grantee of the whole (b).

*Obj.* 2. Here is a departure in the defendant's rejoinder; in his plea he comes and pleads performance of all, and in

(a) Want of *profert* is cured on general demurrer. Lutw. 1355. 4 & 5 Ann. c. 16.

(b) *Ante*, C. 49, 50, and notes, *ibid.* Com. Dig. Pleader, O. 1. *Keria Lath-*

*bury v. Arnold*, 1 Bingham, 217. Whether the grantee of parcel must shew the original deed, see 10 Co. 92-3. Cro. Jac. 70. Heath's Max. (Cunningh. ed.) 98-9. Com. Dig. Pleader, O. 5.

his rejoinder alleges an excuse why he could not perform one, viz. because the Judge had not taxed the sum; and he ought to have pleaded it specially in his bar, that he had performed all but that, and for that the Spiritual Judge had not taxed, &c. and so it is pleaded 5 Co. *Lamb's* \* case. 5 Co. 19, *Roswell's* case. 5 Co. 20, Sir An. *Mayne's* case.

And *per Jones*, Serjeant.—It is like the case, where a covenant is to pay, and the defendant pleads performance; the plaintiff saith he did not pay; the defendant rejoins that he tendered; it is a departure.

*Nota*; It was held *per Curiam*, that upon a bond to perform covenants, you must assign but one breach; but in an action of covenant, as many as you will (*d*).

can be assigned. *Secus*, in an action

After plea of performance of a covenant to pay, defendant cannot rejoin a tender (*c*).

In an action on a bond to perform covenants, only one breach of covenant.

(*c*) Co. Lit. 304 a. Cro. Car. 76. 2 Barnard. B. R. 193.

537. 1 Ld. Ray. 107. *Vid.* 8 & 9 Will. 3, c. 11.

(*d*) Doctr. Placitand. 144-5. *Post*, p.

### FOWLE v. DOGLE.—In C. B.

( C. 175. )

Continued from p. 127.

PER *totam Curiam* judgment was given for the tenant.

1. And as to the first objection, that he pleaded non-tenure to so many acres, and did not shew in which vill they lie; It was answered, that he had pleaded it as well as could be, for he did set forth in whose possession they were; and in 33 H. 6, 51, it is made an objection by *Littleton*, because the tenant doth take upon him to say in which vill so many acres lay as he pleaded non-tenure to. Co. Ent. 329, 333.

The common law was, that if a man pleaded non-tenure to the whole, he need not shew who was tenant; but if the non-tenure were but to part, he ought; and so is 33 H. 6, 51. 11 H. 4, 15. 36 H. 6, 6. And the reason was, because before the statute of 25 Ed. 3, a non-tenure of part did abate the whole writ; but since, by that statute, the whole writ shall not abate; a non-tenure to part, without shewing who is tenant, is good enough; because the reason of the law is altered; but it is used still to follow the old form, and to shew who is tenant of that part.

But *per Vaughan*, the difference is, when it appears that the party was once seised, if he pleads non-tenure, he must shew who is tenant; but otherwise if he were never seised.

As to the second objection, that the fine of a fourth part is pleaded *per nomen* of a third part, they all held it to be well enough; because a third part must necessarily include a fourth.

And though it be not said in how many parts to be divided, it will be well enough; and they agreed the case Fitz. Brev. 244. 1 Leon. 114, that a writ of two parts, and doth not say in how many to be divided, is not good; because two

A *feme covert*, who had an estate tail with remainder in fee to her sisters, joined with her husband in levying a fine with warranty against both of them and the heirs of the *feme*, to the use of both for their lives, with remainder to the heirs of the husband. The *feme* died without issue, leaving her sisters heirs. Held, 1st, that the warranty of the husband was extinguished by taking back an estate for life. 2d, That the warranty of the *feme* descended to her heirs during the husband's life. 3d, That he might use the warranty to rebut her heirs, (the sisters), who

[ \* 158 ] brought a former in remainder.

A plea of non-tenure of parcel needs not shew in what vill the lands lie. *Ante*, p. 126. 1 Mod. 181. Carter, 241. Such a plea must shew who the tenant is. *Secus* of non-tenure to the whole (a).

Pleading a fine of a fourth part, *per nomen* of a third part, is well enough. Cart. 242. *Ante*, p. 126, and p. 77, C. 94. A fine of a "fourth part," without saying into how many parts to be divided, is well enough. *Secus*, in a writ. Shep. Touchst. p. 12. 5 Cruise Digest, 154, &c.

When husband and wife join in a fine of the wife's land, the law notices from whom the estate passes. Cro. Eliz. 129. 2 Co. 57 b. Dougl. 44. If the owner of land and a stranger join in a warranty, both are alike bound. *Per Vaughan*. C. J.

[ \* 159 ]

Where the warrantor takes back as large an estate as that which he warranted, his warranty is extinct. 1 Mod. 182-3.

parts do refer to no certain number of \* parts, but a fourth part implies a division into four; and besides, there is great difference between a fine, which is a common assurance, and a writ (b).

As to the main point in law, which was concerning the collateral warranty,

1. They agreed, that here was a collateral warranty, by the very text of Litt. sect. 719.

2d Quest. But the great question was, whether or no this should descend upon the heirs of the wife, the husband surviving, who was jointly bound in the warranty too; and whether the husband, being tenant, might take advantage of this by way of rebutter against the two sisters?

And *per totam Curiam* he may.

*Obj.* And as to the great objection that was made out of Sir William Herbert's case, 3 Co. 14, where it is said in this case, that the land of the husband alone may be put in execution, they said,

That in that case several things were agreed.

1. If two do warrant, the whole is warranted by each of them.

If there be occasion to vouch, both might be vouched; but if one have no assets, all the burden shall fall upon the other.

But then he comes and says, where baron and feme do warrant against them and the heirs of the feme, if the feme dies, the lands of the baron only may be put in execution; but it is no where said, that execution may not be against the heirs of the feme too; but because there are no moieties between baron and feme, the baron may be charged with the intire.

And *Ellis* said farther, that the warranty did enure properly from the wife, and that the husband was joined only for conformity; but the law takes notice of the person from whom the estate passes. 1 Inst. 176. Plow. 514. Leon. 114. and so said *Atkins*. *Sed Vaughan negavit*; for he said, if the owner of the land and an estranger join in a warranty, they are both alike liable; and so where the husband and wife warrant, the land of the husband shall be bound.

And here the warranty of the husband is absolutely gone as soon as it was created; or indeed, as *Vaughan* said, here never was any warranty at all created, but it was stifled in the very birth, as my Lord Hobart expresses it. Hob. 24.

\* And so the warranty must remain wholly against the heirs of the wife; for the warranty of the husband in this case was merely nominal, for it never had any effect, neither could it possibly have any; for he warrants but for life, and therefore, as soon as the use was limited to him for life, he took as great an estate in the land, as he had limited in the

(a) *Ante*, p. 126. Doctr. Placit. 128. Abatement, F. 14. Booth. Real Actions, p. 28. Com. Dig. (b) *Post*, p. 228. Cowp. 348, 349.

warranty, and so it was clearly gone, and no use could ever have been made of it; for if the wife had survived him, she could have taken no advantage of it, because it determined by his death.

And it was held by *Atkins*, *Ellis*, and *Windham*, that if but part of the warranty had descended upon the demandants, it would have barred them for the whole; this case is, when the husband, being in possession, makes use of it by way of rebutter, according to the resolution in 8 Co. *Syms's* case; though you must upon a voucher vouch all, yet in cases of a rebutter, if one heir demands the whole, she may be rebutted for the whole, though the warranty descended upon her and several others.

But *Vaughan* denied *Syms's* case to be law; and said that 45 Ed. 3, 23, was contrary to that resolution, and truly cited, notwithstanding what is said by Lord Coke.

And he said, he could see no reason of difference, that when a man vouches he must vouch all, or else he loses his voucher; and yet that he should rebut one for the whole, and the other should be discharged; and he said, the book cited by Lord Coke there, *Fitz. Garranty*, 78, warrants not that case; for he said, he would agree, that if there be three coheirs, upon whom a warranty descends, and one only demands, she shall be rebutted for the whole; for there the warranty that descends upon her is proportionable to the interest that descends to her; but in *Syms's* case the estate descended wholly to one, and the warranty upon two; and so he said the demandant ought to have been rebutted for a moiety. 6 Ed. 3, pl. 15, 50.

And he said in this case, if another person had had the estate, and had been impleaded by the heirs of the wife, he did question whether they could have been rebutted for more than a moiety.

And whereas it was objected, that this warranty descended upon the demandants when they were covert; it was said by *Windham*, that here their entry being taken away by the fine, which wrought a discontinuance, it should bind them nevertheless: but if a warranty descends upon \*infants, or feme coverts, where their entry is lawful, it shall not bind.

(c) Co. Lit. 380. Watk. Gilb. Ten. 148, and note, *ibid.* Shep. Touchst. 188.

Carter, 243.  
Vaugh. 365.  
Litt. § 743.  
2 Thomas Co.  
Litt. 317-8.

*Semb.* Where several are bound to warrant lands, the tenant must vouch all: but where one of them is demandant, he shall be rebutted for the whole. *Vaugh.* C. J. dissent. 1 Mod. 182-3. 22 Viner, 38-9.

Co. Lit. 373 b.

1 Mod. 182.

Where a warranty descends upon an infant or feme covert it shall not bind, [ \* 160 ] if their entry be lawful. *Per Windham, J. (c).*

### OSBERSTON v. STANHOP.

( C. 176. )

S. C. 2 Mod. 50. 3 Salk. 180, differently reported.

**DEBT** upon an obligation against an heir.

The defendant pleads, that his father was seised of Black Acre, and made a lease for 99 years, and the reversion descended to him, and that he had *riens præter*.

The plaintiff replies, that he hath assets descended in London.

The defendant demurs.

In debt upon a bond, the heir pleaded no assets but a reversion after a lease for years. Held, that the plaintiff should reply assets *ultra*, or



take judgment  
of assets *cum*  
*acciderint*.  
Com. Dig. Plead-  
er, 2 E. 3 & 4.  
*Vid.* Precedents  
in 2 Mallory,  
416. Carth. 129.

Resolved that the replication was naught, because he doth not answer the defendant's bar, nor traverse, when the defendant did offer him an issuable point; for he should have said that he had assets besides the reversion, or else have prayed judgment, and have had execution by a *Sci. fa.* when assets should descend; as Cro. Car. 373, and 8 Co.—*Mary Shipley's* case, and the precedents are that he should have replied, that he had assets *ultra*, as Yelv. 169. 2 Cro. 236. *Jud' pro def' (a)*.

(a) A reversion expectant on a lease for years is *immediate* assets, and the term cannot be pleaded in delay of execution, notwithstanding precedents to

the contrary. See *Smith v. Angell*, 2 Ld. Raym. 783. 2 Wils. 49. Notes to *Jefferson v. Morton*, 2 Saund. 7 c. 2 Atk. 294.

[ 161 ]

## DE TERM. S. TRINITATIS, 1674.

IN COMMUNI BANCO.

( C. 177. )

GADBURY v. DAY.

In declaring on a promise, in consideration of forbearance to sue a stranger on a bond, whether it be necessary to shew that the bond was forfeited? Cro. Jac. 397, 548, 593. Com. Dig. Action on Assumpsit, H. 3. 4 East, 455. 1 New Rep. 172.

THE plaintiff declares that one Hall was bound to him in an obligation, conditioned to pay 50*l.* when his son should attain the age of 21 years, or be out of his apprenticeship; or if his wife should die before that, then as soon as she should die; and sets forth that he was about to sue Hall, and that the defendant, in consideration he would forbear, promised, if Hall did not pay him in a week, that he would. Upon *non assumpsit* a verdict was found for the plaintiff.

It was moved by *Baldwin* in arrest of judgment, that the plaintiff did not shew, that any of the times were come when the money ought to have been paid; and so if no money were due, then the forbearance of suit was no good consideration, as was resolved in the case of *Bille* and *Porter*. *Ante*, Case 147, [p. 125.]

*Scroggs e contra*—It being found for the plaintiff, it shall be intended that it did appear upon the trial, that there was a debt; and besides, the debt here is not in question; but it is the forbearance that is the consideration; and when it is said that he was about to sue him, it shall be intended that he had cause of action; and cited Hob. 18, 216.

[ \* 162 ]

Hob. 5.  
Judgment arrested, because entire damages were given, and one count was bad (a).

\* But upon that point the Court gave no resolution; because in the declaration there was an *Indebitat' assumps'*, and entire damages were given; and it was not said for what he was indebted; so that it might be for bond or rent, &c. (b). And so it being bad for that part, *quod concilium non negavit*, it was bad for the whole; and so judgment arrested.

(a) *Ante*, C. 29, C. 102. 2 Doug. 730. 1 Barn. & Ald. 161. (b) *Ante*, p. 104.

( C. 178. )

ELLIOT'S CASE.

In all writs of error to reverse outlawries, bail must be put in

THE sole question was, whether, upon a writ of error brought in the King's Bench to reverse an outlawry in this Court, bail ought to be put in before the allowance of it, by the sta-



tute of 31 Eliz. 3? And it was resolved, that in all writs of error it ought; and so the words must be intended, or otherwise that part of the statute will be of no effect, if it should be extended only to cases where the error is for want of proclamation; for it doth not appear at the time of the allowance of the writ of error what errors the party will assign; and it was said, that at the common law, when a man was outlawed in a personal action, he was not bound to appear when he reversed the outlawry; but in cases criminal, as for felony, &c. he was to appear and plead (a): and *per Vaughan*, the course is now, if there be want of proclamations, to go before a judge, and reverse it without plea or writ of error (b).

before the allowance, by stat. 31 Eliz. c. 3, and not only when want of proclamation is assigned for error. *Sed vid.* 1 Ld. Ray. 605. 12 Mod. 545. 12 East, 622.

(a) Bac. Ab. Outlawry, (G). (b) *Solly v. Forbes*, 8 Taunt. 516. S. C. 2 B. Moo. 567.

### WILLIAMSON v. HANCOCK.

( C. 179. )

S. C. 1 Mod. 192. 2 Mod. 14. 3 Keble, 408.

THE case was, that a collateral warranty was made upon a feoffment to uses: the question was, whether the *cestuy que use* might rebut by virtue of this warranty? See margin, *post*, p. 188.

And it was argued by *Maynard*, that he shall not; because the *cestuy que use* is in by the *post*, and not by the *per*; and he denied the opinion in *Linc. College's* case, which he said was no resolution, because it was no point in the case.

Where the estate is gone in the *post*, before the warranty attached upon the heir, the warranty is gone; but if it be once attached upon the heir before the estate be gone in the *post*, there he that is in possession may; and he cited 22 Ass. 37. 29 Ass. 24. 18 Ed. 3, 29. 22 Ass. 69.

\* *Baldwin e contra* agreed that the defendant should take no advantage by way of voucher, but by way of rebutter he might. 35 Ass. pl. 9. 11 Ass. pl. 3. But he said that persons that come any way to possession may rebut, as tenant by courtesy, who comes in in the *post*. 20 H. 6, 19 b. 28 Ass. pl. 18. 45 Ed. 3, 18. 42 Ed. 3, 19. [ \* 163 ] *Post*, p. 188.

But he that comes in by the statute of uses comes not merely in in the *post*, but *quasi* in the *per*, by the limitation of the party.

And to that which was objected by *Maynard*, that there is a special proviso in the statute, that *cestuy que use* shall for a certain time take advantage by aid prayer, voucher, &c. which implies, that after that time he should not, *Baldwin* admitted he should not, after that time, take advantage by way of aid prayer, or voucher, but by way of rebutter he might. *Post*, p. 189.

A warranty cannot at all be in a bargain and sale, because the very bargain comes in by way of use.

But it may be in a release or feoffment to uses, because the feoffee and releasee are in by the common law; and then the statute transfers the estate to *cestuy que use*; and if the warranty should not be transferred, so as the party might take

advantage of it by way of rebutter, it would much weaken the common assurance of the nation.

But to that *Maynard* said, the *cestuy que use* might take a release with warranty.

And *Baldwin* said that it is sufficient to rebut, that the warranty be attached upon the heir before the action brought, though it did not before the transferring of the estate; and he cited the case of *Bowles* and *Horton*, ante, Case 73. *Fowle* and *Dogle*, ante, Case 148, 175. [*Post*, p. 188. S. C.]

( C. 180. )

## LEEFE V. SALTINGTON.

Continued from p. 150.

It was argued by *Baldwin*, that the wife had power to dispose of a fee: and first, it was agreed by all, that in this case it was not intended of a power to dispose of that estate that was given her for life, for that she might do without any such power given her.

*Post*, p. 177.*Ante*, p. 149.*Post*, p. 176.

[ \* 164 ]

A feme covert may execute a power. Hargr. Co. Lit. 112 a. n. (6).

Com. Rep. 494.

(1) Styl. 258.

He agreed that the fee is not by this devise in the wife, but rests in the heir until a disposal be made, which she may do by a declaration in pursuance of her power, though she make no formal conveyance, as it was resolved in *Daniel* \* and *Upton's* case, that a feme covert may make a disposal in pursuance to her power; if it should be intended that she should dispose only for life to one of her children, that might be to no purpose, for the life might die before hers; and he cited a case in the King's Bench, *Heale v. Green* (1), Hill. 49. Rot. 376, where the case was, J. S. possessed of a term for 100 years, devises it in this manner:—

I give and bequeath to H. my wife all my lands, to set and let, and make estates out of them in as ample manner as if I were living, during her life; the remainder after the death of my wife to my daughter. H. makes a lease for 99 years, if three persons lived so long. The question was, whether this did determine by her death? And it was held that it did not, notwithstanding the remainder, for that was to be taken upon a contingency, if the wife did not dispose of it.

But *Windham* said, that would not come up to this case; for being but a term for years it would pass by a devise of the land(2): and he said, in a will a fee will pass in many cases without the word "Heirs," 19 H. 8, 9. Bro. Devise, 39. 1 Inst. 9 b. and so the intent of the testator shall be taken, as in the case of *Web* and *Taylor*. One that could not write good English, having been beyond sea, writes, "I do make my C. Gyles Bridges my soly aery and executory the manor of Minton in Glocest(3)." Ow. 32. Moor, 57, Fees by Implication.

(2) Dy. 307 b. 2 W. Bl. 1306-7.

Words in a will pass a fee without the word "heirs," if the intent appear.

(3) *Post*, C. 731.

*Nudigate pro quer'* agreed, that a devise to dispose at will and pleasure passes a fee, Lat. 59, and that the intent of the deviser shall be taken; but it was agreed by all, that according to Hob. 32, the intent must be certain when it is to disinherit an heir.

*Ante*, p. 11.

If the devisor had devised it to such of his children as his wife should name, this would have carried but an estate for life; and this devise, as it is, is the very same in effect; and he cited Moor, 52, 356. 6 Co. *Wild's* case. 2 Cro. 52. 1 Rolle, 834.

*Vaughan* and *Atkins* seemed to incline, that she should have power to dispose of an estate for life only, because if the testator had said "I dispose of it to my son," it would have been but an estate for life. 2 Lev. 104.

But *Windham* and *Ellis contra*:—Forasmuch as there is a difference between a devise of an interest and a power, and they granted that if the testator had said "I dispose of it to my son," it would have been but for life; but here the testator gives a power to dispose, which seems to imply \*such a power as he had himself, which was to dispose of the fee. [ \* 165 ] Post, 176.

*Curia advisare vult.*

Serjeant *Porter* put this case to Serjeant *Hard*. A man devises his land to J. S., whereupon a crop of corn was growing, and after devises all his personal estate to H. *Qu.* Who shall have the crop of corn? And their opinion was, that J. S. should have it, because a devise of land carries the emblements by implication; and when he devises all his personal estate, it shall be intended such as he had not devised before. [Continued, *post*, p. 176.]

1 Rol. 727.  
Cro. Eliz. 61.  
Win. 51.  
Whether the devisee of the land shall have growing crops in preference to the legatee of the personal estate (a)?

(a) See the different authorities in the note to Harg. Co. Lit. 55 b. Gilb. Evid. 247-8, 4th edit. Buller N. P. 34. *Cox v. Godsalve*, 6 East, 604, n. (d). *West v. Moore*, 8 East, 339. It is to be ob-

served that in the two last cases, where the decision was in favour of the legatee, the words *stock upon the farm* were used in the legacy, which are stronger than the words of the case put by Serjeant *Porter*.

### THREADNEEDLE v. LYNUM.

Continued from p. 120.

( C. 181. )

It was now argued by *Jones pro quer'*.

It was observed by him, that the bishop, without the dean and chapter, had too little power, and with the dean and chapter that he had too much; the first was remedied by the statute of 32 H. 8, and the latter was restrained by this statute of 1 Eliz.

The old accustomed rent is not here reserved; for an identity of the sum doth not make an identity of the rent, but it ought to be the same rent issuing out of the same land; (5 Co. *Jewell's* case); and this issues not out of any part of the demesnes of Trequair, for they are excepted. Nat. Brev. 178. In an assise of a rent, all the land out of which it issues ought to be put in view. 5 Co. *Montjoy's* case, there was an acre more than was demised before, rendering the antient rent, and if it be not *verus et antiq' redditus* when it issues out of more, *a fortiori* when it issues out of less. 2 Cro. 112, 173. Moor, 770 a.

And though it be found, that the manor of Brouneere be of the value of 116*l.* *per ann.* and so sufficient to satisfy

the rent, yet that will not do, for the remedy must be left as beneficial for the successors; and therefore, 5 Co. 5, if the rent be reserved payable at two days, where it was antiently at four, it is void, because not so beneficial to the successor.

*Obj.* Here is a benefit to the successor; for here he will have his apportionment of the old rent for that which was not surrendered, and will have all the new.

*Ans.* Here can be no apportionment, and a reservation *pro rata* is not good. 5 Co. 5. 1 Inst. 44 b.

[ \* 166 ] This division of lands is very inconvenient for the successor, for if he may distribute it into two or three parts, \*so he may distribute it into twenty; and it may beget great disputes between the successor and the tenants upon the apportionment of it.

*Obj.* This is a restraining statute, and therefore ought to be taken strictly.

*Vid. Bac. Ab.*  
*Office, (D).*

*Ans.* It is not always so; for, 1 Inst. 45, the lease must be made in writing, and it must not be dispunishable of waste; and yet neither of these are within the letter of the statute. 10 Co. 58, &c. Offices are in the equity of the statute, though not within the letter; and in *Montjoy's* case that act was restrictive as well as this; and, Cro. Car. 22, it was doubted, whether the lease then were good or not, where it leases two parts, that used to be let severally, together, and reserves more than the antient rent; and, 1 Co. 139, *Popham* seems to say that it is not good. And in answer to 1 Inst. 44 b. that a rent by tenant in tail might be reserved *pro rata*, he said, that the penning of the statute of 32 H. 8, is very different from this; for there, if he lets for eleven years, reserving less than the usual rent, he may afterwards let it for the same, and it shall bind his issue; but upon this statute it must be the old and accustomed rent that must bind the successor.

*Maynard pro def*—The design of the statute was for the benefit of the successor, to abridge the power of the bishops, (with the consent of the dean and chapter).

And he said, that every part of the provision had been construed by equity, and not kept strictly to the letter, *scil.* "hereditaments;" though the office of a register, (surveyor,) be no hereditament, yet it is within the statute, 10 Co. 60, though strictly they are not hereditaments; and so an office may be granted in reversion, where it hath antiently been so. 1 Cro. 556.

Here is, in an equitable sense, the old and accustomed rent, for that intends no more than the same in quantity.

It cannot be intended the old rent in a strict sense, for that determined with the old lease. In the stat. 31 H. 8, of monasteries, the like expression; and yet in Dy. 123, an equitable construction put upon it.

And it is a good diversity which is taken in 8 Co. 90, of

conditions, and is applicable to leases, when they are made to support estates, and when to destroy them.

He cited a case of the Bishop of Gloucester, where he leased part of a manor, and then leased the manor, reserving the old rent, (which passed only the reversion of that part which was in lease); yet that was held a good lease, and \*is [ \* 167 ] enjoyed till this day, and yet there is not so good a remedy for the rents (1).

Besides, if so be the statute should be taken strictly as to the old rent and the old land, it might fall out, that the bishop should be incapable to demise; as where there is a manor that hath been usually let, which consists of demesnes and services, and the freehold escheats, this could not be let by this strict construction, for then there would be more land, and less services.

And as for *Montjoy's* case, that is for a particular family, and they may tie themselves up under what limitations they please; but this is of a general concern; and besides that, there it is said *verus et antiq. redditus*, but here it is only the accustomed rent.

And the Court seemed to incline that the lease was good. *Sed advisare volunt.* [Continued, *post*, p. 179.]

(1) *Quere*, if this be the case in Hale's MSS. cited Hargr. Co. Lit. 44 b. n. (7).

*Post*, p. 182.

### HILL v. GOOD.—In C. B.

( C. 182. )

Continued from p. 156.

Now *Vaughan*, C. J. delivered the opinion of the whole Court, which was, that a consultation ought to be granted in this case; and that this was a marriage intended to be prohibited by 32 H. 8.

A man may not marry the sister of his deceased wife.

And first he observed, that the causes of marriage did formerly belong solely to the Ecclesiastical Courts (1), and that the Temporal Courts had nothing to do to prohibit them till this statute of 32 H. 8, 38.

(1) *Sed vid. ante*, p. 95.

The temporal courts never prohibited the ecclesiastical courts in causes of marriage, till 32 Hen. 8, c. 38 (a).

And as to the unlawfulness of this marriage he held three assertions,

*First Assert.* That it is expressly prohibited by the Levitical law.

In this matter the construction of the Hebrews and their practices are good precedents; for in construction of any law there are these rules:

The practices of the Hebrews are good precedents in the construction of the Levitical law.

1. *Postulat'*, It is necessary, that every law be given in such words as it may be understood.

2. The meaning of the words of a law is to be gathered from their common use before the law made, (or else by some law made to explain them).

*Vaugh.* 305.

And therefore all old laws are best explained by a cotemporary exposition; as for instance, Mag. Char. ch. 29, what

The meaning of laws to be gathered from

(a) *Vide* S. C. *Vaugh.* 304. *Harrison* 499, (1st edit.). *Gould v. Gapper*, 5 East, v. *Burwell*, *ib.* 207. *Home v. Camden*, 372. 4 Term Rep. 397. 1 Gibson's Codex,

contemporaneous exposition.

[ \* 168 ]

Vaugh. 305.

Post, p. 287.

2 Inst. 683-4.

Post, p. 347.

Vaugh. 306.

Meaning of  
"near a-kin,"  
in Leviticus.  
Vaugh. 306.

1 Gibs. Codex,  
498.

Vaugh. 308.

(2) Gilb. Rep.  
158. 1 Bl. Com.  
435.

is meant by *liber homo*, and what by *parium suorum*, would be very obscure and incertain, had not usage since the time of making that law explained them.

\* 3. All interdicts of marriage are directed to the man; but for as much as every marriage must be between a man and a woman, where the man is forbid the woman is so consequently.

The reason why the man only is forbid is, because he is the primary agent in uncovering nakedness, and the woman merely passive; and the man was *ducere uxorem*, and she only to consent.

The first thing observable is the general prohibition, *Lev. xviii. ver. 6*, "None shall approach to any that is near of kin to him:" but this of itself would not have been intelligible, for every one may be said near in respect of a remoter, and therefore this had been useless, without something more to notify who should be the persons accepted as near of kin.

This is explained in *Lev. xxi. 1, 2*, for there it appears, that by *near* of kin there are meant the *next* of kin; as in the ascending line the father and the mother, in the descending the son and the daughter, in the collateral the brother and sister.

The extent of the prohibitions is not to be confined to the Levitical instances, for then marrying his daughter would not be unlawful; for that is not mentioned neither in *Lev. xviii.* nor in the statute of 25 H. 8, 22, nor 28 H. 8, 7, where prohibited degrees are recited.

But the most certain rule for the extent of the prohibitions is, that it doth extend to those that are near of kin, (*ut supra*), and to those that are near to those that are his near of kin; so not only the *propinqui*, but the *propinquis propinqui* are also forbid, and that is the utmost extent of it (2); as the mother's mother and the daughter's daughter, and the sister's sister or sister's mother, &c. for these are near to those that are near; as a man's sister is near to him, so his sister's sister is near to her, and by consequence near to her that is near to him.

And this appears ver. 11, "Thou shalt not uncover the nakedness of thy father's sister, for she is thy father's near kinswoman;" and that is *propinquo propinqua*, for the father is near to him, and she is near to the father, that is to say, near to him that is near to him.

Mother's brother and sister's daughter, though not mentioned, yet, being *in pari gradu*, they are also prohibited.

And the prohibition must be extended to a parity of degree.

[ \* 169 ]

Vaugh. 309.

2. For when a law, that forbids those that are near of kin to marry, determines who are near, none of those \* that the law denominates to be near, are more or less near than another; as one attorney is not more an attorney, or serjeant more a serjeant than another; and the consequence of that is, that none under that notion can be more or less forbid than



another; and so there is the same reason in those that are *propinquis propinqui*: *Lev. xx. 19.* The father's sister and the mother's sister are said to be near of kin, and yet they are only *propinquis propinquæ*. And so it is of the son's daughter and the daughter's daughter, they are expressly forbid; and by the same reason, to marry the wife's grandmother, for he that doth so, marries his wife's daughter's daughter, for his first wife is the daughter's daughter to the last: and the wife's mother and sister are prohibited within the first rule, though not expressed, for they are near to the wife, *prout*. Vaugh. 310-1.

In our tables there are thirty persons that are prohibited. Vaugh. 311.

The *Carii* expositions forbid eleven more.

The 18th verse of the 18th chapter may be intended to prohibit the wife's sister absolutely, as well as in the lifetime of the wife. Vaug. 312, 241.  
Ante, p. 108.

For that expression "to vex her," may be intended of vexing her by reason of a jealousy that she should have in her lifetime, that her husband would marry her sister when she should be dead.

The apostolical canon 16th forbiddeth it expressly, *qui duas sorores duxit clericus esse non potest*: and this cannot be intended of two sisters at the same time, for polygamy was never allowed amongst them. Vaugh. 312.

And therefore at that time, the marrying of the wife's sister was either lawful or unlawful; if it were lawful, why was it punishable? if it were unlawful, how comes it to be lawful now?

A marriage may be unlawful, and yet not so as to dissolve the marriage; but that is when it is made unlawful by human authority.

Among the Jews an incestuous marriage was void, and the parties punishable. [Vaugh. 313.]

But it was not so among the primitive Christians; but the reason was, because divorcing is an act of jurisdiction, and they had no such power; but all that they could inflict in those cases was, to eject him from their communion; and that appears in the case of the incestuous person, 1 *Cor. v. 1*, St. Paul could do no more than forbid him their communion.

\*Seld. *Ux' Heb. li. 1, cap. 12, fol. 18.* The marriage of the wife's sister forbid. [ \*170 ]

The primitive Christians followed the exposition of the *Carii* and the *Scriptuarii*, who went not by tradition, as the Scribes and Pharisees did, but by the text; but the Scribes and Pharisees had more authority amongst the Jews (b).

But both did agree the prohibition of those mentioned, but the other do and twenty more; and in the *Provinciale concilium Illiberinum* (3), Can. 16, it is expressly forbid.

(3) Vaugh. 315.  
Grotius, *ubi supra*.

(b) Vaugh. 314. See some account of the points of difference between the Karaites or *Scriptuarii* and other Jewish sects in Jennings's *Jewish Antiquities*, B. 1, c. 9, p. 202, 223. ed. Edinb. 1808.

The Levitical Prohibitions distinguished from the Levitical Degrees. Vaugh. 319.

Marriages not within the degrees, may yet be prohibited by God's law. Vaugh. 319, 320. *Ibid.* 220. 1 Gibs. Codex. 497.

Vaugh. 320.

(4) "Consultation." *Vid.* Vaugh. 320. *Post*, C. 334.

No entry is made of prohibitions denied. Vaugh. 323.

When an act of parliament declares a thing to be forbidden by God's law, it must be admit-

*2d Assertion.* If it were not within the Levitical prohibitions, yet it is within the Levitical degrees; and therefore this Court ought not to grant a prohibition, for their power is only where it is without the Levitical degrees.

Marriages within the Levitical degrees were sometimes lawful, and sometimes not; but those that are within the Levitical prohibitions were never lawful.

It is not said by the act of parliament what are the Levitical degrees; nor is it said that all marriages within the Levitical degrees are prohibited by God's law, and that none but such are against God's law.

For marriages may be without the Levitical degrees, and yet prohibited by God's law; as in case of pre-contract, &c. as 2 Inst.

And although this marriage should not be unlawful, yet the impeaching of it here cannot be hindered, because it is within the Levitical degrees, as appears by the 18th verse of the 18th chapter; for let that be intended of taking a sister in the lifetime of the wife, yet that is a prohibition *sub modo*; for then polygamy was lawful, and he might have taken any other, and therefore it is a Levitical degree.

For a marriage is not therefore unlawful because it is within the Levitical degrees; for marrying the brother's wife is expressly within the Levitical degrees, and yet that was in some cases lawful.

Sir Ed. Coke, in his scheme in the second Institutes, names this very degree as prohibited. [2 Inst. 683.]

And *Man's* case, Moor, 907, it is said a prohibition was granted where the case was for marrying the wife's niece; but Cro. Eliz. 228, in the very same case it is afterwards said that a prohibition (4) was granted.

And for *Parson's* case in the first Institutes, the first impression (now omitted) it appears upon the Roll, Hill. 2 Jac. Rot. 1032, a consultation was at last granted (c).

Hob. 181, it is expressly said there was cause for a divorce *a vinculo* by the marrying his wife's niece. [1 Roll. 832].

[ \* 171 ]

\* And Sir *Giles Allington's* case (d) was, that he was divorced for marrying his niece of the half blood, and no prohibition granted. Besides, no man can tell how often prohibitions have been denied in these cases, for there is no entry of prohibitions denied.

*3d Assertion.* Admitting it be without the Levitical prohibitions and degrees, yet we ought not to prohibit the impeaching of it; because it is forbid by God's law, and the words of the statute are, *God's law excepted*. And for that, when an act of parliament declares a thing to be forbid by God's law, it is to be so taken by us, especially when it is but to explain what is meant by a forbidding by God's law in another act of parliament; and this is declared to be forbid by God's law, 28 H. 8, 7.

(c) As to *Parson's* case, *sec ante*, p. 73. Vaugh. 322, 248. *Post*, p. 287.

(d) Vaugh. 323. S.C. 2 Lev. 254. 2 Show. 71. *Post*, p. 287, 511.

**Obj.** That statute is repealed by the statute of 1 & 2 Ph. & Mar. and not revived by the stat. 1 Eliz. (e).

**Ans. 1.** It may be a question whether or no this branch of it be repealed; for there are two branches that concern marriages; one that declares these degrees, and another which disallows of dispensations, and that is most probable to be the branch intended to be repealed, because that did most in-  
eroach upon the church of Rome.

**Ans. 2.** Admitting it had been repealed, yet it is, as to this point, by implication revived by the statute of 1 Eliz.

For that act revives the statute of 28 H. 8, cap. 16, which takes notice of the declarations of this statute of 28 H. 8, cap. 7, which declares what marriages are prohibited by God's laws: and besides, we are to take that to be forbid by the law of God, which a lawful canon declares to be so.

And this marriage is declared unlawful by the law of God by the canons of king James, where the table of consanguinity and affinity is set forth.

And these canons are confirmed by act of parliament, and so are become the established law of the nation; and then it is as much as if an act of parliament had declared it, when such a canon declares it (f).

*Et ad hanc opin. Justiciarii assenser'. Consultation granted per Cur' (g).*

(e) There is some doubt about this, see Vaugh. 323-4-5-6-7. 1 Gibs. Codex, 496. 2 Burn's Eccles. Law, 439, (8th edit.) 1 Bl. Com. 435. It is remarkable that no notice is taken throughout this case of stat. 1 Mary, sess. 2, c. 1, which repeals both 25 Hen. 8, and 28 Hen. 8. See 1 Evans's Coll. Stat. 151-2, n.

(f) Vaugh. 327. 2 Ventr. 41. Vaugh. 244. Com. Dig. Canons, C. However, it has been since determined that the Canons of 1608, where they are not merely declaratory of the antient canon law, are not *proprio vigore* binding on the laity, nor do they appear to have been ever confirmed by the parliament. *Middleton v. Croft*, 2 Stra. 1056, 1060. 2 Atk. 667. S. C. 1 Bl. Com. 83. 2 W. Bl. 968. 6 Term Rep. 493. 8 Term Rep. 414.

(g) See *Wortly v. Watkinson*, 2 Lev. 254. S.C. post, p. 287. *Worthy v. Buxton*, 3 Keb.

620. *Watkinson v. Mergatton*, T. Ray. 464. *Skinner*, 37. *Haines v. Jescott*, 5 Mod. 168. *Clement v. Beard*, ib. 448. *Snowling v. Nursey*, 2 Lutw. 1075. *Butler v. Gastrill*, Bunb. 145. *Aughtie v. Aughtie*, 1 Phillimore, 201. *Faremouth v. Watson*, 1 Phillimore, 355. 1 Black. Comm. 434-5. 1 Gibson's Codex, 498, 1st edit. Bac. Ab. Marriage, (A). Com. Dig. Baron & Feme, B. 2, 3. 1 Evans' Collec. of Stat. 151-2, notes, 2d edit. 15 Viner, 255-6-7: and the learned argument of Mr. Alleyne on this subject, called the "Legal Degrees of Marriage considered." Note, a marriage voidable for affinity cannot be impeached after the death of either party. *Harris v. Hicks*, 2 Salk. 548. Carth. 271. Co. Lit. 33 a. *Elliot v. Gurr*, 2 Phillim. 16. *Brownword v. Edwards*, 2 Vea. Senr. 245.

### SACKVILL v. EVANS.—In C. B.

(C. 183.)

DEBT was brought in the *Debet* and *Detinet* against an administrator, for rent incurred, upon a term for years, in his own time. He pleads—Fully administered.

\* The plaintiff demurs.

And the Court held that he had good cause of demurrer.

For although an administrator or executor, after the death of the testator, may waive the occupation of a term, and then

To debt in the *debet* and *detinet* against an

[ \* 172 ]

administrator, for rent incurred in his own time, the plea of *plene*

*administravit* is bad. *Post*, C. 282, 417, 510, 528. 1 Mod. 185. 1 Salk. 297, 317. *Tindall v. Wood*, Lilly's Ent. 155. *Jevens v. Harridge*, 1 Saund. 1, n. (1). 1 Wils. 4. Debt for rent by an executor, on a lease by his testator, must be in the *detinet* only: *aliter*, if on a lease made by himself. Cro. Jac. 685. Cro. Car. 225. Com. Dig. Pleader, 2 D. 1. *Post*, p. 403-4.

they shall be chargeable no farther than they have assets; yet if they do possess the term, they shall be chargeable for the rent *de bonis propriis*, if it incurs in their own times.

But it was agreed, that if an executor bring an action for rent upon a lease made by the testator, it must be in the *Detinet* only; but if an executor makes a lease himself, it must be in the *Debet* and *Detinet* (a).

And authorities in the principal case cited were, 1 Rolle; 603. 2 Cro. 238, 411. 2 Brownl. 202. Cro. Eliz. 711. 1 Bulst. 22. Moor, 566. Pop. 220. Sty. 61. *Taly's* case; and Sir *W. Austin's* case, lately in this Court.

(a) But *semble*, when the plaintiff is entitled to sue in the *debet* and *detinet*, he may sue in the *detinet* only. *Wilson v. Hobday*, 4 Maul. & Selw. 120-5.

( C. 184. )

### THE KING v. CLARKE.

*S. C. post*, p. 178. 1 Mod. 195. 2 Mod. 1. 3 Keb. 412.

THE question was upon the grant of the king.

*Nudigate*—That the king's grant shall be void in these following cases:

1. Where he is misinformed in his grant. 1 Co. 52.
2. Mis-recital shall avoid it. Moor, 318. Hob. 224, 231.
3. If the king be deceived in matter of fact, or matter of law (1), it is void. 10 Co. 112. 1 Co. 46.
4. Want of form will avoid the king's grant. Hob. 243, 323. 1 Co. 50. Dyer, 124.
5. When the thing is in him, or comes to him in another manner than he supposes. 4 Co. 34. 1 Rol. 192. Moor, 888. Hob. 170. 1 Co. 49. 2 Co. 33. 11 Co. 90. 2 Rol. 186. Hob. 323.

(1) *Vid.* 1 Ld. Ray. 50.

*Hard.* That the king's grant shall be good.

1 Mod. 196.

1. If there be an original certainty, although there be a mistake after. 2 Cro. 34, 48. Yelv. 42. 3 Leon. 152. 1 And. 148. 29 Ed. 3, 7. Dy. 83. Godb. 423. 10 Co. 110. 10 H. 4, 2.

2. There is a difference when the mistake relates to the title of the king, and when it is but a denomination of the thing. 9 H. 6, 28. 8 H. 7, 3. 10 Co. 110. 21 Ed. 4, 49. 3 H. 7, 6. 38 H. 6, 31. 9 Ed. 4, 11, 12.

3. The king's grant shall be construed liberally for his honour. Stat. 18 Ed. 1. 6 Co. 6. 1 Co. 43 b.

[ 173 ]

### DE TERM. S. MICH. 1674.

IN COMMUNI BANCO.

( C. 185. )

### MORE'S CASE.

Damages increased by the

MORE brought an action of assault and battery against —

who pleaded *De son assault demesne*; and a verdict being for the plaintiff, they gave him 6*l.* damages at the assizes; but upon view of the mayhem, it appearing that he had lost two of his fingers, and was thereby disabled to follow his trade of cloth-shearing, the Court increased the damages to 100*l.*

(a) 2 Ld. Ray. 176. 1 Wils. 5. 2 Wils. and *Hoare v. Crozier*, E. 22 Geo. 3, K.B. 248. 7 Viner, 271. Bac. Ab. Damages, (E). Tidd's Pr. 918, 6th ed. Bull. N. P. 21.

## WITTERONG v. BLAYNY.

( C. 186. )

Continued from p. 148.

It was now argued by *Hopkins*, that a *Sci. fa.* would not go into Wales.

It must be admitted, that before the statutes 27 H. 8. 34 H. 8, it would not go.

And it appears to be the judgment of the parliament. 1 Ed. 6, 10. The preamble takes notice that the king's writs did not run into Wales; and till that statute the sheriffs of the Welch counties were not bound to attend the Courts at Westminster, 5 Eliz. 23, *de excommunicato*, in the \*preamble, recites, that the king's writs did not run into Wales, and so is 32 H. 8, 4.

A *scire facias* issued into Wales upon a judgment of the Courts at Westminster. See the notes to C. 130, 168.

[ \* 174 ]

*Obj.* Here would be a failure of justice, if execution might not go into Wales.

*Ans.* It cannot properly be called a failure of justice, where a remedy is not applied that by law is not applicable; as the case of *Lacy*, put in *Bingham's* case, 2 Co. where a murder could not be tried, and yet no failure of justice. Stamf. lib. 2, 6.

Vaugh. 398, 417. Moor, 121.

*Obj.* The authorities are 2 Cro. 484. 1 Roll. 394. Cro. Car. 331. *Certiorari's* sent into Wales.

*Ans.* Those cases differ from this; for there the king is concerned, and *Cap. Utlagat.* and mandatory writs, &c., may go into Wales. 2 Bulst. 54, and *Pedo* and *Piper's* case, Fitz. Jurisd. 23. *Curia advisare vult.*

*Ante*, p. 147.

*Postea*, in Hilary Term, judgment was given by *Windham*, *Atkins* and *Ellis*, (*Vaughan defuncto*) that a *Sci' fa'* would go into Wales. *Jud' pro quer'.*

## DONE v. DR. BAREBONE.

( C. 187. )

THE plaintiff sets forth an indenture of release of certain houses, &c. made by him to the defendant, wherein *recitatum fuit*, that he had made a lease of the premises to the defendant, to the intent that he might be capable to take a release, &c. and that the defendant thereby covenanted to leave him a passage under, &c. six foot broad and nine foot high; and for breach said, that the defendant *coarctavit et obstruxit viam, per quod* he could not enjoy his passage six foot broad and nine foot high, *prout.*

On a covenant to leave the plaintiff a way six feet wide &c. how a breach shall be assigned for narrowing it. 3 Leon. 13. 1 Ld. Ray. 452. 1 Show. 252.

The defendant demurs.

1 Saund. 298.  
Hob. 298.

*Baldwin pro def'*—Here is no sufficient breach alleged; for to say, that he did *coarctare viam*, and not say how straight he did make it, is not a sufficient breach; for the way might be ten foot broad, and so he might *coarctare*, and yet leave it six foot, and then the *ita quod* shall not help it; for that is but an inference and conclusion upon what went before, and is not traversable, as 2 Co. 47, 48, *ratione cuius*, or *virtute cuius*, is not traversable. 11 Co. 10; and Plow. 14, 15. *Et issint bastard nest traversable*.

And so to plead, that a deed was rased *et issint non est factum*, he cannot traverse the *non est factum*.

[ \* 175 ]

*Jones pro quer'* answered, that the defendant might take his traverse well enough, that he did not *coarctare viam*, *per quod* he could not enjoy his way six foot broad and nine foot high; for this differs from the cases cited, for there the conclusion was a matter in law, as discharge of tithes, bastardy, &c. but here it is mere matter of fact.

*Vaughan* and *Ellis* seemed to incline, that the breach was bad; but *Windham* and *Atkins* that it was well enough; for when it is said that he did *coarctare viam*, it shall relate to the way spoken of, which was six foot wide, &c.

*Semb.* In declaring on a covenant contained in a release by plaintiff to defendant, the previous lease is sufficiently pleaded by way of recital in the release. *Vid.*

1 Saund. 274,  
n. (1). 3 Barn.  
& Ald. 70.

*Baldwin* took another exception; for as it is here pleaded, it doth not appear that any estate passed to the defendant; for here is a deed pleaded, wherein *recitatum fuit* that there was a lease, which is no pleading of a lease sufficiently; and if there were no lease, then the deed of release was void, and no estate passed by it, and then those covenants, which were made upon supposition of an estate passed, will fall to the ground.

To that *Jones* answered, that where an estate is determinable, and relative covenants in the same deed, there, when the estate determines, the covenants are gone (a); but if no estate pass, the covenants may be good enough: as where a charter of feoffment is made, with a letter of attorney to make livery, and a covenant quietly to enjoy from henceforth, if the party be disturbed before livery, the covenant is broken. *Ellis* thought the lease was well enough pleaded. *Windham*:—It is but inducement to the action however, and the title of the land is not now in question. *Sed per* consent the plaintiff amended.

(a) 1 Roll. 522. 2 Brownl. 135. *Ante*, C. 48. *Post*, C. 609. 6 Vin. 415-6-7.

( C. 188. )

DAWES v. PAINTER.

S. C. 2 Mod. 45. 3 Keb. 26.

The 5 & 6 Ed. 6, c. 16 on the sale of offices does not extend to Barbadoes(a).

IN consideration the plaintiff had made the defendant secretary in Barbadoes, and would admit him to the said place, the defendant covenanted to pay him 400*l.* *per ann.* so long as he should continue in the said place.

The defendant pleads the statute 5 Ed. 6, 16.

(a) 2 Salk. 411. 4 Mod. 222. 2 Ld. Ray. 1245. 2 P. Will. 75. 4 Burr. 2500. Dougl. 38. 13 Viner, 412.



The plaintiff replies, that that island was no part of the king's dominions at the time of the statute; and that it is not governed by the laws of England, but by laws and constitutions of their own.

The defendant demurs.

The main question was, whether or no this statute did concern those islands? And *per Curiam* it doth not; for all islands and other places *extra 4 maria*, though they are part of the king's dominions, yet they are not governed \* by the laws of England, unless it were so appointed by act of parliament; and so Callis and Gascoigne were governed by their own laws; and so are Guernsey and Jersey at this day. 4 Inst. 286. And so Ireland was not governed by our laws, till it was so specially ordered by King John; and in Henry the Seventh's days a law, called Poyning's law, was made, whereby all the statutes then in force in England were so in Ireland. 1 Inst. 141.

[ \* 176 ]  
1 Bl.Com.105-6.  
*Ante*, p. 147.

And statutes at this day made do not extend to Ireland, unless it be specially named.

It was admitted, that some statutes that were made for public advantage, and beneficial laws, might extend to new things not *in esse* at the time of making the statute; as Magna Charta, cap. 21, that exempts lords from carriages, extends to degrees of nobility not *in esse* at the time of making the statute. 2 Inst. 35. But penal statutes never do so (*b*).

Statutes for public advantage and beneficial laws may extend to things not *in esse* at the time of making them. *Secus*, of penal statutes. Sir T. Jo. 68. 6 Taunt. 103.

(*b*) Cro. Car. 104. That the above statute is rather remedial than penal, see *Law v. Law*, 3 P. Will. 393, and note *C. ib.* S. C. Cases Temp. Talbot, 140. And equity will interpose in cases not

strictly within the statute. S. C. and Fonbl. Treat. Eq. B. 1, C. 4, § 4, n. (*u*). The act is now extended to Scotland, Ireland, and the foreign dominions of the Crown, by 49 Geo. 3, c. 126.

### LEEFE v. SALTINGTON.

Continued from p. 165.

( C. 189. )

AND it was argued now by *Windham*, *Atkins* and *Ellis* for the plaintiff; and they all held, that in this case the wife had an estate for life, (with a power to dispose of the fee,) but her estate was but for life; for where an express estate is devised, it shall never be controlled by an implication; as a devise *in perpetuum* carries a fee, but a devise for life *in perpetuum* is but an estate for life. 15 H. 7, 12. 1 Bulst. 219. Jones, 138(c). But a devise to dispose at will and pleasure carries a fee. Bro. Devise, 39. 1 Leon. 283. Latch, *Daniel* and *Upton's* case.

A. devised a farm to his wife for her life, "and by her to be disposed of to such of his children as she should think fit." Held that the wife took an estate for life, with a power to dispose of the fee. *Vaughan*, implication(*b*).

C. J. dissent (*a*). An express estate for life by devise, shall not be controlled by

(*a*) See *Thomlinson v. Dighton*, 1 Salk. 239. Comyn, 194. 1 P. Will. 149. *Doe v. Pearson*, 6 East, 173, 180. *Anonym.* 2 Kely. Ch. Ca. 6. 8 Viner, 234. *Goodtitle v. Otway*, 2 Wils. 6. *Reid v. Sher-*

*gold*, 10 Ves. Junr. 370.

(*b*) See *Gardiner v. Sheldon*, *ante*, p. 11, 12, and note (*c*), *ibid*.

(*c*) Co. Lit. 9 b.

Co. Lit. 9 b.

*Ante*, p. 164,  
165.

[ \* 177 ]

Distinction between the devise of an interest and of a power. *Ante*, p. 164-5. Sugd. on Powers, p. 96, &c. 2d edit.

*Ante*, p. 163.*Ante*, Case 9.

Construction of the word "Dispose."

A devise "to dispose at will and pleasure," or "as the devisor shall think fit," or "at his discretion," passes a fee. *Latch*, 137. *Sir W. Jones*, 137.

And when it is said *to dispose*, and not limited how to dispose, that is at will and pleasure; and so if it had been *to dispose*, and not said, to whom, she might have disposed of it to what person she would; and so when she is not limited to any estate, she may dispose of what estate she will: A devise to sell, or to be sold, the party may sell the fee. *Keilw.* 43, 44. 19 H. 8, 9. 1 Inst. 113 a.

2. When the testator gives his wife a power to dispose, it shall be intended the whole power which he himself had to dispose; as when a man devises that J. S. shall be his heir, he shall have a fee; for it shall be intended that he shall have the estate, as his heir should, if he had not devised it. *Hob.* 75.

*Obj.* If the testator had said, "I dispose of it to such an one of my children;" this would have passed but an estate for life, without mentioning any estate.

*Ans.* There is a difference between an interest and a power, there he passes an interest, but here a power, which shall be intended his whole power, as in the cases *supra*. If I sell you my land, without saying for what estate, only an estate for life passeth; but if I devise that J. S. shall sell, he may sell the fee.

*Obj.* Here is a devise for life to her, and this power shall relate to the disposal of that estate for life.

*Ans.* That cannot be intended, nor was it much insisted upon; for that would be a vain power, and no more than the law gave him [*her*?].

*Obj.* To pass a fee, and disinherit the heir, the intent must be manifest, for an heir shall not be disinherited by implication. *Cro. Car.* 157, 447, 449. *Cro. Eliz.* 742, 743.

*Ans.* These rules hold where the words give an estate, but this is creating of a power. The word "dispose" is a word of a large extent, and may be applied to the passing of an interest, and so it signified in the statute of wills. *Cro. Eliz.* 525, 526. They said this case in effect is the very same as *Daniel* and *Upton*, *Latch*, 135; and though there were more words, yet the word that rules the case is the word "dispose" *et expressio eorum quæ tacite insunt nihil operatur*.

The authorities cited were 3 Leon. 71. 1 Leon. 156. *Moor*, 77.

*Vaughan e contra pro def'*—He agreed, that a devise to dispose at will and pleasure, or as she shall think fit, or at her discretion, passes a fee to the party; but here it is agreed there is no estate in the wife but for life; for if it vested in her by way of interest, she hath not conveyed it away, for she hath made no conveyance that is found in the special verdict, but only a declaration that she did dispose of it.

And if the interest doth but vest in her for life, then she is but to nominate and specify the party that is to take; and then the case will be no more, than if the words had

been, "I will and bequeath W. Farm to such of my children as my wife shall think fit at her disposal, or, at the disposal of my wife to such of my children as she shall think fit," and then clearly there had been but an estate for life. *Sed sententiae numerantur non ponderantur*, and so, my three brothers being against me, judgment must be for the plaintiff(a). Carter, 232.

(a) The opinions of the judges are erroneously reported in 2 Lev. 104.

—◆—

THE KING v. SIR FRANCIS CLARKE and the BISHOP of RO-  
CHESTER.

S. C. Ante, p. 172.

[ 178 ]  
( C. 190. )

THE case was no more but that the king grants the advowson of the church of Laborne *Archiepiscopo Cant' nuper spectant'*(a); whereas the archbishop never had it. The question was, whether or no this church, being particularly named, though the description was false, would not pass? and it was argued by *Maynard* that it would not; for it is possible there may be more advowsons of the church of Laborne than one; and this description, which should ascertain it, being false, the grant is void. Fitz. Grant, 58. 21 Ed. 3, 7, and *adeo plene* (1), &c. as the abbot had it, will not help it; for these words pass nothing that was not passed before, but go to the manner of having it. 8 H. 4, 2. And besides this is a falsity relating to the title, which makes it the worse.

A grant by the king of the advowson of the church of L. "lately belonging to the archbishop of Canterbury," is good, although it never in fact belonged to the archbishop.

(1) As to these words, *vid. S. C. 2 Mod. 2, 4.*

*Turner pro def'* argued, that the thing being particularly named, a falsity in description shall not avoid the grant; as Bac. Elem. *Præsentia* (2) *nominis tollit errorem demonstrationis*. 1 Leon. 120. 29 Ed 3. 7, 8. 1 And. 148. Plow. 192. 2 Co. 34. 10 Co. 113. 10 H. 4, 2. Cro. Car. 548. Dy. 87. Hob. *Needler's* case. Bro. Annuity, 10. 2 Cro. 48.

(2) *Veritas nominis, &c. Vid. Bac. Tracts, p. 102.*

Here the intent of the king is to pass it, and construction ought to be made as near the intent as may be; 6 Co 7; and Sir *J. Molins's* case, 1 Leon. 119, 120. 2 Cro. 24.

And the king's grant ought to be construed for the honour of the king, and the benefit of the subject. 2 Roll. 200, 201, 185. 8 Co. 56, 176. 21 Ed. 4, 46. 10 Co. 64. *Vid. 2 Rol. 185.*

Afterwards in Hilary Term judgment was given *per Cur' pro def'*; for the church being particularly named, and the king not being deceived either in his title or value, it is well enough.

And these diversities were taken in the construction of grants by the Judges in arguing:

1. Where there are only general words, with the pronoun *illa*, as *omnia illa*, &c. there all the subsequent descrip- Where a grant is in general

(a) The grant was made "*adeo plene* as the said archbishop had it, or as it was in our hands, by any ways or means howsoever;" words which strengthen the

case of the grantee, and which were particularly adverted to by the judge. See 2 Mod. 1, and the other reports of *S. C. ante*, p. 172.

words, as "*omnia illa*," &c. the subsequent descriptions of the thing granted must be true; otherwise the

[ \* 179 ] grant will be void, as well in the case of the king as of a common person.

But, where the thing is sufficiently ascertained by a particular name, a subsequent false description will not avoid the grant, unless it appears that the king was deceived in his title, or in the value, or in any thing relating to his profit.

tions must be true, or else the grant will be void, as well in the case of the king as of a common person.

2. Where the thing is named by a particular name, that doth sufficiently ascertain it, though the subsequent descriptions be false, yet the grant is good enough, in the case of the king or a common person; only with this difference; if it appears either that the king was deceived in \* his title, or in the value of the thing, or in any thing relating to his profit, the grant is void against the king. *Vide* Cro. Car. 546, 547 (b).

(b) See *post*, p. 332. *R. v. Kempe*, 1 Ld. Ray. 49. *R. v. Bishop of Chester*, *Ibid.* 292; and, generally, on the construction of royal grants, Bac. Ab. Prerogative, (F) 2. Com. Dig. Grant, G. &c. The doctrine in the text, in cases of variance between the name and the description of a grantee, is agreeable to Bro. Ab. Grants, pl. 92, and Bac. Max.

Reg. 25, where many rules of construction are laid down. And see *R. v. Bishop of Chester*, 1 Ld. Ray. 303. S. C. Show. Parl. Ca. 212. Shep. Touchst. p. 99. *Goodtitle v. Southern*, 1 Maul. & Selw. 299. *Doe v. Earl of Jersey*, 1 Barn. & Ald. 550. *Doe v. Huthwaite*, 8 Taunt. 306. S. C. on error, 3 Barn. & Ald. 632.

(C. 191.)

### THREADNEEDLE v. LINUM.

Continued from p. 167.

A bishop, seised of two manors, which had been antiently let together at an entire rent, leased both to A. at the antient rent for three lives. A. underlet a part to B. and then surrendered the whole to the succeeding bishop, who leased the manors (excepting the part underlet to B.), reserving the whole antient rent. Held that the second lease was a good lease within the stat. 1 Eliz. c. 19. *Vaughan, C. J.* and *Ellis, J. dissentientibus.*

The stat. 1 Eliz. c. 19, is a private act. 4 Co. 76. 5 Co. 2. 19 Vin. 497. 2 Mod. 57. 1 Burr. 220.

THIS case was now argued solemnly by the Judges; and *Ellis* argued *pro quer'*, that this lease was not good against the ancestor.

The case is no more but this: two manors were antiently demised for the rent of 64*l.* 1*s.* 5*d.* and now the bishop leases one of them for the whole rent; the question is, whether this be a good reservation of the old and accustomed rent within the statute of 1 Eliz. for the case depends wholly upon the construction of that statute.

And he held this not good within that statute, because it is not the old and accustomed rent; for that was issuing out of both the intire manors, and this is but of part; and he cited *Montjoy's* case, where it was held, that the rent being reserved intirely out of the whole, and there being one acre of waste demised which was not demised before, it should not be said to be *verus et antiquus redditus*; and so there it was held, that the demising of two several farms, and reserving one rent intirely out of both, was not good; and so if part were demised, and a rent reserved *pro rata*.

*Obj.* And whereas it hath been objected, that *Montjoy's* case is upon a private act of parliament, and so shall have a stricter construction;

*Ans.* This is but a private act, and unless it be pleaded, or found, we are not bound to take notice of it.

2 Crb. 458. In a lease made by a prebend, reserving the antient rent, the crab-trees were not excepted, which used

to be excepted, and so more passed to the lessee than formerly; and it was held, that this was not the antient rent, because it issued out of more than it used to do; and then *a fortiori*, when it issues out of less, it shall not be said to be the antient rent. Cro. Car. 22, 23 (a). Two tenements, antiently demised for several rents, were demised together, reserving both the rents intirely; and there it is made a doubt, and no resolution given; but in a private report that I have, it appears that the Court did strongly incline that it was bad; and so Cro. Car. 95, where it is said, "rendering the old and accustomed rent," and says nothing in certain, there it is void.

To draw a parallel between this and *Montjoy's* case: [ \* 180 ] that was a private act of parliament, and so is this; that was made for the benefit of the issue, and this is made for the benefit of the successor.

In this they differ, that in this statute here is the word yearly, and so it may be good, although it be reserved at other days; as if it were payable at four days, it may be reserved at two days, &c. so it be the same by the year; which would not have been good in the case of *Montjoy*.

In a lease under 1 Eliz. c. 19, it is enough if the same yearly rent be reserved, although payable on different days. Co. Lit. 44 b. 6 Co. 38. Ambl. 740. 5 B. & Ald. 363.

Another reason why this is bad is, because although the rent be the same in quantity, yet the remedy for it is not so beneficial.

*Obj.* In 1 Inst. 44, it is held, that tenant in tail may let *pro rata*.

*Ans.* That is my lord Coke's single opinion, and by some, that have argued, denied to be law; but I shall admit it to be law; but that will not warrant our case; for that is upon an enabling law, and so shall be taken beneficially; but ours is upon a disabling law, and shall be taken strictly, like to conditions. 8 Co. 60. *Conditio beneficiæ quæ statuta construit benigne*, &c. and the words of 32 H. 8, differ from this statute; for here it is said, the old and accustomed rent, but there it is said, as much rent shall be reserved.

*Obj.* Here is no prejudice, but rather a benefit to the successor.

*Ans.* Though there be no prejudice, yet if the reservation be not according to the statute, it will not be good: as if a lease be made for four lives, and two die in the life of the present bishop, or if he reserve but 5*l.* to himself, and 10*l.* the old rent, to his successor, it will not be good.

10 Co. 62.

5 Co. 6. Post, p. 182-5.

But here may be a prejudice; for here is an exception of part, and it is not found of what value, and so there may be no remedy for the rent; and although it be found that each manor is of the value of 11*l.* *per ann.* yet values are uncertain, and are altered almost every year.

Finding an indorsement or recital in a deed, is no finding

A verdict finding an indorse-

(a) When the addition of more land, with or without the addition of more rent, shall avoid the lease, see Bac. Ab. Leases, (E). Rule 7, vol. 3, p. 363, 5th edit.



ment or recital in a deed, is no finding of the thing indorsed or recited. *Per Ellis, J. Post*, p. 529. *Sed vid.* Bridgman's Reports by Bannister, p. 558.

the thing recited or indorsed. Cro. El. 111. Noy, 147. And so he concluded that judgment ought to be given for the plaintiff.

*Atkins, Just.*—This is a good lease, although it be but a part of that which used to be demised together; for as a surrender may be made of part, so there may be a demise of part alone; for if part be surrendered, it is but a part that is in lease, and that is *facere per obliquum quod non potest directe*, if a lease of part should not be good.

[ \* 181 ]

\* According to the letter of the statute this is not the old rent, for none can be called so but that individual rent which was reserved at the time of the statute, or before, which is impossible, so that the old rent shall be intended but the same in quantity, and such is here reserved. 1 Inst. 222. If a man grants a rent by deed for life, and granteth further by the same deed, that he and his heirs shall distrain for the same rent, this is a grant of a new rent in fee-simple, for the same is only the same in quantity.

It is a rule in construction of statutes, that the meaning and the end is to be regarded more than the letter. 2 Inst. 107, 110, 111. Dr. & Stud. 29 b.

This statute also is to be taken favourably, for it is a restraining law, that abridges the power of bishops that they had before the making of this statute; for they might then, with the consent of the dean and chapter, have made leases for as long as they pleased; and it always has been construed favourably, and by equity, as 10 Co. 60. Granting of necessary offices, with a reasonable fee, shall bind the successor, though it be a new bishoprick, and so cannot be said to be antiently granted; but the reason that is given is, because it is no prejudice to the successor. Cro. Car. 557, 47, 259. 5 Co. 14. Where an office hath been usually granted in reversion, it shall bind the successor, because it is no prejudice to him. Cro. Car. 557. 5 Co. 14. The mischief, that is taken notice of, is the impoverishing of the successor. Moor, 107. A concurrent lease was held good, because, though it be not in the letter of the statute, yet it is in the meaning good enough, it being for the advantage of the successor; for he shall have two rents, the one by estoppel, and the other in point of interest; though in Lat. 242, there is an opinion against that case.

*Obj.* in *Montjoy's* case it is held that a rent *pro rata* is not good.

*Ans.* The cases there put are not the principal case, but only cases put by counsel in arguing, and so were not directly under the deliberation of the Court; and for the case of letting two farms together, which used to be let severally, there can be no necessity in that, but it is an act of wantonness only; whereas there may be great advantages in letting of a part, for the bishop may many times have a tenant for part when he cannot for the whole.

Besides, *Montjoy's* case differs from this: for that is con-

On grants of offices, *vid.* Hale's MSS. Harg. Co. Lit. 44 a. Bac. Ab. Office, (D). 1 Burr. 219. *Post*, p. 394.

*Post*, p. 184.

Two farms, usually leased separately, cannot be jointly demised by a bishop, reserving the two former rents entirely. *Ante*, p. 179. Bac. Ab. Leases, (E). Rule 7. 3 Vol. p. 363,



cerning a power to derive an estate out of another's interest, [ \* 182 ] viz. his issues; but here the estate is derived out of the bishop's interest, for he is seised in fee (b). 5th edit. Post, p. 187.

And there *Wray* agrees the case of co-parceners, that one may demise, reserving a rent *pro rata*; and so, although a tenancy escheat, the manor may be demised at the rent it formerly was. 5 Co.5. Bac. Ab. Leases, (E), Rule 7, 3 Vol. p. 364, 5th edit.

1 Inst. 44. In the case of tenant in tail, the Lord Coke held that a rent may be reserved *pro rata*.

This agrees well enough with the end of the statute, for that is for the preservation of hospitality; and that is the reason why, if a less rent be reserved to himself, and the old rent to his successor, that it is not good; for reserving a less rent to himself disables his hospitality; but here the bishop hath the whole rent, and part of his land too. Post, p. 185.

And the reason why he shall let no lands but such as have been usually let, is to injoin him to keep lands in his hand to preserve hospitality; and by the words of the act he may reserve more than the old rent; and if he may reserve *pro rata*, then he may reserve more than *pro rata*. More than the old rent may be reserved, under 1 Eliz. c. 19. Co. Lit. 44 b.

It is better for the commonwealth, and for the bishops, that they have power to make a severance, as my Lord Coke observes upon the statute of *Quia emptores terrarum*, that it was very beneficial to the commonwealth, where the tenant had power to alien a part, and the tenant to hold *pro particula*, which Lord Coke extols for a very excellent law.

And so this being for the benefit of the commonwealth and the succeeding bishop, that the bishop should have power to reserve *pro rata*, it shall be good within the statute, and much more here, where a greater rent is reserved; and so judgment ought to be given *pro def'*.

*Windham*, Justice.—As where part is surrendered, the bishop shall have an apportioned rent; so if part be demised for an apportioned rent, it is well enough.

He agreed, that although there are no words in the statute of *usually demised*, yet a bishop cannot lease lands to bind his successor, but such as have been usually demised; which shews this is a statute that in construction is taken by equity, and must have the qualifications of 32 H. 8. 1 Inst. 44 b. 45 a.

He agreed that the bishop cannot lease two farms together, that used to be let severally, according to the resolution in *Montjoy's* case, for that would be very inconvenient for the succeeding bishop; for if he may join two, he may join twenty; and so whereas the bishop had formerly twenty tenants, by that means he should have but one. [ \* 183 ]

As for the case in Cro. Car. 22, there is no resolution, and so *nihil inde venit*.

As for the case, Cro. Car. 95, the reason why that reservation was not good is, because there was no particular rent reserved, but in general terms *the old rent*, &c. A reservation in an ecclesiastical lease of the old rent generally, is bad (c).

(b) *Vid.* Sugd. Powers, p. 598, 2d edit. p. 184. Acc. *Orby v. Mohun*, 2 Vern.  
(c) *Cont. per Vaughan*, C. J. post, 531. 3 Chan. Rep. 102. 2 Freem. 291,

Besides, it may be impossible for the bishop to let all together, for part may be evicted, or swallowed up of the sea, &c.

And if a rent *pro rata* may be reserved upon the statute of 32 H. 8, much more here, for that is a statute that gives a power which the party had not before; but this restrains him of a power that he had before.

This is the accustomed rent in quantity, though not in quality, and so is in some measure in the letter of the statute.

Lease by a bishop of two acres, reserving a rent out of one, is bad.

If the bishop should let two acres, and reserve a rent out of one only, it would be void; for there the bishop had nothing for the other acre; but here he hath part of the land, and his whole rent too.

And if this statute should be taken literally, the cases of grants of offices could not be good; for no rent is reserved there; neither could the cases of concurrent leases; for without question the statute intends leases in point of interest, and not by estoppel; by which cases it plainly appears, that the statute is to be taken by equity, and not literally; and so he concluded with *Atkins pro def.*

In the construction of a beneficial statute, it is not enough that the intended benefit be secured, unless it be by the ways and means prescribed by the statute. *Per Vaughan, C. J. Vid. Carth. 37.*

*Vaughan, Chief Justice, pro quer.*—This is a statute made for the benefit of the successor; but it must be by such ways and means as the statute hath prescribed: and it is not sufficient that the benefit of the successor be secured, but it must be according to the statute, for otherwise it will be an act of intent only, if the enacting clause be not pursued; for if the benefit of the successor in general had been intended only, it might have been much more compendious, as only to enact that the predecessor should do nothing in prejudice of his successor; but the consequence of that would have been nothing but contention and disputes, whether or no such and such particular acts were beneficial or prejudicial to the successor: but the Judges now are not to determine what acts are prejudicial to the successor, but what acts do cross the intent of the law-makers in those metes and bounds which they have prescribed.

Concurrent ecclesiastical leases.

[ \* 184 ]

And the Judges made a very strange construction of this statute, when they adjudged a concurrent lease to be good \* in the case of *Fox and Collier*, and that was not adjudged upon the benefit presumed to be to the successor, but those Judges did take it to be within the letter of the statute and the meaning of the statute; whereas it was neither within the one nor the other, and was denied to be law by the best lawyers of those times, as Dyer, Plowden, Mede, and others (*d*).

For it is plain, when there are concurrent leases, that

and notes, *ib.* 2d edit. *Shannon v. Bradstreet*, 1 Sch. & Lef. 52. 10 Mod. 473. *Coxe v. Day*, 13 East, 126.

(*d*) On concurrent leases by ecclesiastical persons, *vid.* Bac. Ab. Leases, (E) Rule 8. Hale's MSS. Harp. Co. Lit. 44b.

n. (7). *Goodtitle v. Fumican*, 2 Dougl. 573. *Wilson v. Sewell*, 1 W. Black. 617. Sugden Powers, 593, 601. *Mun v. Baylies*, *post*, p. 342-3. *Lyn v. Wyn*, *Bridgman's Reports*, by Bannister, p. 135; and Appendix, *ibid.* 592.

there are other leases than for twenty-one years or three lives; and if the lessee of the concurrent lease should die, his executor should not be bound, by the estoppel of the concurrent lease, to pay the rent.

The old rent is not the old sum of money only, but it must be issuing out of the same lands.

For, if it issues of but an acre more, it is not the old rent, as *Montjoy's* case; and *a fortiori* when it issues out of less land, it cannot be the old rent. If it should be admitted, that the old rent may be reserved out of half, then it may out of a sixth part, and so a tenth part, and so the old rent would be reduced to nothing, for there is no stop or *repagulation*, if you once admit a part.

It is clear it is not the benefit of the successor only that is sufficient to support the lease, if the statute be not pursued; for if double or treble rent be reserved, and the lease made by a deed poll, it would not bind the successor; and so if it should be made to begin *a die datus* (e).

The intent of the statute was, that whatsoever accidents should fall, yet the successor should be secure of his old rent; and when it is reserved out of part, that may not be sufficient to answer it, and then the intent of the statute is avoided.

I shall admit, that if a farm hath been set for 100*l* *per ann.* part may be let *pro rata*, upon Sir Ed. Coke's reason, 1 Inst. 44, for that is in effect the same rent.

Part of a farm, usually let at a certain rent, may be demised by the bishop, at a rent *pro rata* (f).

And though those cases in *Montjoy's* case, pressed by counsel and denied by the Court, be not the principal case; yet if they had been law, they would have over-ruled the principal case, and so are of the same authority as a principal case resolved.

Cro. Car. 94. The case of *Ap Rees* is much to this point; for that lease was not (as hath been said) held void because the rent is not expressed; for without question a lease reserving *the old rent* is a good reservation enough (2); but the reason of that case was, because part of what was usually demised being excepted, it was impossible the rent that issued out of the residue should be the old rent.

(2) *Sed vid. ante*, p. 183, note (c). 5 Co. 3.

\* *Obj.* This statute must be expounded by equity, because the old rent literally cannot possibly be reserved, for that was the rent that was in being at the time of the statute; so the old rent must be construed the same in quantity.

[ \* 185 ]

*Ans.* That is no equitable construction, but the very literal construction, for that is the pregnant signification of the word; as when it is said a man keeps to his old diet, it is not meant in common parlance that he eats that very meat

(e) But see Bac. Ab. Leases, (E), Rule 2. Hale's MSS: Harg. Co. Lit. 46 b. n. (8). *Pugh v. D. of Leeds*, Cowp. 714. *Welch v. Fisher*, 8 Taunt. 342.

(f) Bac. Ab. Leases, (E), Rule 4. All doubts have been removed as to ec-

clesiastical leases, by 39 & 40 Geo. 3, c. 41. And it appears by the case of *Doe v. Wilson*, 5 Barn. & Ald. 363, that the doubts were unfounded, and the statute therefore superfluous.

A law enacting  
an impossible  
thing is void.  
*Post*, C. 398, p.  
320.

which he did formerly, but the like; so the old is that which is similar to the old; for when a law enacts any thing, it must be construed of a thing that is possible, for otherwise the law would be void; as statute of Wreck, West. 1, cap. 4, the goods wrecked are to be preserved for a year, but that must be meant of such as are capable of preservation. Plow. 464. 2 Inst. 168.

*Obj.* This statute hath been taken by equity; as in the cases put of granting offices.

*Ans.* Though offices, out of which no rent can be reserved, should be demisable, though out of the letter of the statute, yet that will never prove that lands, &c., out of which rents may be reserved, may be demised against the letter of the statute.

*Obj.* Maintaining hospitality is the chief end of the statute; and if that be provided for, the end of the statute is answered.

An ecclesiastical lease is not binding, which reserves less than the old rent to the lessor, although the old rent or more be reserved to his successor. *Ante*, p. 182. Bac. Ab. Leases, (E), Rule 7.

*Ans.* That alone is not sufficient unless the lease be warranted by the statute; as appears where less than the old rent is reserved to the lessor, and more to his successor, yet the lease is void; and the reason why such a lease is not good, is not because reserving less to himself prejudices hospitality; for then by the same reason he could not remit the rent during his life, which he may certainly do; but the reason is, because the direction of the statute, in reserving the old rent, is not pursued.

*Obj.* If the old rent might not be reserved, it might fall out that the lands might never be in a possibility to be let again; as if part of the lands usually let should be evicted, or, if lying near the sea, part should be drowned.

*Ans.* 1. It being now become impossible that the whole should be let, perhaps it may be good for part.

2. But supposing it, by this means, could not be let, then the bishop must keep it in his own hands, as he doth others of his demesnes.

[ \* 186 ]

\* 3. A rent *pro rata* I do agree to be good, and so the remainder may be let *pro rata*.

*Obj.* This nicety would disturb many men's estates, there being many leases, out of which part is excepted that usually hath been demised.

*Ans.* There is nothing follows from that objection, unless we must always, when bad leases come to be disputed, adjudge them good, lest we should prejudice men's estates.

*Obj.* This will in time come to be the old rent.

Hardr. 325-6.

*Ans.* No process of time can ever make that the old rent, which was not so at the making of the statute.

And so he concluded for the plaintiff. But the Court being divided, no judgment was given.

*Vid.* 3 Keb. 382.

But afterwards, *Vaughan* dying in Mich. Term, 1674, *North* was made Chief Justice, and he agreed with *Atkins* and *Windham*, that judgment ought to be given for the defendant.

*Et puis come audivi, cest judgment fuit affirme in bre d' Error in B. R. [Vide S. C. on error, 3 Keb. 583, 595. Pollexf. 176.]*

## DE TERM. S. HILARII, 1674.

[ 187 ]

IN COMMUNI BANCO.

MEMORANDUM, That Sir Jo. *Vaughan* dying this (1) vacation, Sir. *Fra. North* had his writ for Serjeant returnable the first day of this term, and appeared in Chancery, and afterwards, putting on his robes and coif in the treasury, was brought up to the bar by Serjt. *Maynard* and *Scroggs*, the King's Serjeants, where he recited his count, and then went to the lower end of the bar; afterwards the Lord Keeper, coming out of Chancery with a patent in his hand, sat in this Court, and making a speech to him, Sir *Fra. North* replied, and then was sworn in Court, and the Lord Keeper putting on his cap, he sat by him in Court; and then Serjeant *Maynard* put him this case:

(1) See the end of the last case. 3 Kebl. 401.

THE wife tenant in tail of Black Acre and White Acre, each of them usually let for 10s. rent *per ann.* Baron and feme by indenture let both together for one intire rent of 20s., and then the husband dies; the wife accepts the rent, and then enters. *Quære*, whether the entry of the wife be lawful or not?

Sir *F. North* held that she could not enter; for the words of the statute being so much yearly rent, they were sufficiently satisfied by this reservation; and besides, the wife by this is at no prejudice, &c., but he would consider of it till the next term (a).

(a) It seems that her entry will be barred by her acceptance of rent, which makes the lease absolute at common law. *Doe v. Weller*, 7 Term Rep. 478. 2 Saund. 180 a. notes. And that the stat. 32 Hen. 8, is not satisfied by such a reservation, see *ante*, pp. 179, 181, *Threadneedle v. Linum*.

## WILLIAMSON v. HANCOCK.

Continued from p. 163.

[ \*188 ]  
( C. 192. )

A SPECIAL verdict found, that R. Lock was tenant for life, remainder to John his son in tail, remainder to the father in fee. R. L. the father, levies a fine with warranty to the use of J. S., who bargains and sells to the defendant. R. L. dies; the warranty descends upon John the son, who enters and lets to the plaintiff.

*Cestui que use* may take advantage of a warranty by way of rebutter. *Ante*, p. 59, 157. 2 Sal. 685. 22 Vin. 165.

The question was, whether this warranty had barred the son of his entry, and whether the defendant, who came to the estate by J. S., who was in by way of use, should take advantage of it by way of rebutter?

And it was held by *Windham*, *Atkins*, and *Ellis*, (*Vaugh-*

*ad defuncto*) that the defendant should take advantage of this warranty by way of rebutter.

None but privies in estate can vouch or have a *warrantia chartæ*. But an abator, intruder, &c. may rebut. Vaugh. 384, 385. *Ante*, p. 61.

*Ante*, p. 61.  
2 Mod. 15.

A condition not to rebut, annexed to a warranty, is void.

Vaugh. 390-1.  
2 Mod. 15.  
22 Viner, 165.

In every warranty there is a voucher and a rebutter; he that takes advantage by way of voucher, or by a *Warrantia Chartæ*, must come in privy, viz. as heir or assignee of him to whom the warranty is made.

But an abator, or an intruder, may take advantage by way of rebutter; as it appears in *Lincoln College's* case, where all the books are cited. Cro. Car. 145, and *Jones, Fox*, and *Kendall's* case.

1 Inst. 385. An assignee may rebut, though the warranty was not made to the feoffee and his assigns; but he cannot take advantage by way of voucher, no more than he can of a warranty in law, as upon an exchange.

Rebutter is so incident to a warranty, that a condition annexed to it not to rebut would be void.

He that comes in above the warranty shall not take advantage by way of voucher or rebutter, unless the warranty were attached before he came to the estate; as the lord of a villein, &c. 3 Co. 63. 1 Inst. 385, 389; but here the party being in by way of use is *quasi* in the *per*, as it is held in *Lincoln College's* case; and the reasons there moved him to be of the same opinion as that book, whether it were a resolution or not. And so he concluded for the defendant.

*Atkins* of the same opinion.

A warranty is said to be a bar. Litt.

A right is bound by it. 1 Inst. 366.

It doth extinguish a title. Bro. Garranty, 4.

It is a thing that runs with the land. 1 Inst. 385.

[ \* 189 ]  
(1) Sect. 14.

1 Mod. 193.  
2 Mod. 17.

\* As for that clause in the statute of 27 H. 8(1), of Uses, that says, "That such as came in by way of use before the — day of May next ensuing should have all advantages by action, voucher, &c." it is probable that the parliament thought, at the time they had so extirpated uses, that they should have heard no more of them, and so gave that time for people to take notice of the act, because they should not be surprised.

A warranty takes away a right of entry, as well as of action, when it descends on one of full age. 1 Sal. 245. 2 Sal. 685. *Ante*, p. 159, 169.

*Wyndham*.—Warranties are much favoured in law; they work a discontinuance, being annexed to a release; it takes away a right of entry, as well as a right of action, where it descends upon a man of full age; and he concluded, that *cestuy que use* shall take advantage of it by way of rebutter at least (if not by way of voucher (a);) and so shall his assignee, though the assignment were before the warranty attached, as it was in this case. *Jud pro def* (b).

(a) 1 Mod. 193. *Sed vid.* 2 Salk. 685. *Smith v. Tyndal*.

(b) Note: In the above case of *Williamson v. Hancock*, the defendant barred the plaintiff by shewing the collateral war-

ranty in an action of ejectionment. 3 Kebl. 408. And see 2 Salk. 685. Since the 4 Ann. c. 16, such a warranty by tenant for life is void.



## WILCOCKS v. HARRIS.—In C. B.

( C. 193. )

S. C. 2 Mod. 4.

THE defendant avows as bailiff of Sir Fulwood Skipwith for an heriot, and sets forth, that the plaintiff held of him an house by suit of Court, and the yearly rent of 12s. 4d. and an heriot upon death, or alienation without notice.

A verdict is sufficient, if it finds the substance of the issue. Com. Dig. Pleader, §. 26. 3 Wilson, 288. The jury cannot find any thing contrary to the admission of the parties. Com. Dig. §. 17.

The plaintiff says, *quod bene et verum est*, that he held by suit of Court, and the yearly rent of 12s. 4d. *absque hoc*, that he held by suit of Court, 12s. 4d. rent, and an heriot, *modo et forma* as the defendant hath alleged.

The jury find, that he held this house and three others by suit of Court, and the yearly rent of 12s. 4d. (which is 3s. 1d. for this house) and an heriot upon a death, or alienation with notice or without notice.

And it was argued by *Wilmot*, that this verdict doth not find for the defendant, because here is a variance between the issue and the verdict; for the issue was, whether or no he held by the rent of 12s. 4d. and the verdict is, that he held by 3s. 1d. and thereupon he cited 33 (or 3) H. 6, 4. Noy, 65, and the case of *Foly and Tristram*, Mich. 13 Car. B. where infancy being in issue in an action of debt, the jury finds that the defendant owed the money, which implied that he was of full age; and judgment being given for the plaintiff, it was afterwards reversed in the King's Bench. Yelv. 148. 38 H. 6, 21. 21 Ass. pl. 14. And he took a difference between a general issue and a special issue; for in \* a general issue, though it be not found but in part, it is well enough; but not so where the issue is special. Jones, 307. *Hide and Man*. Fitz. Avowry, 218. 2 Cro. 160. The apportionment ought to be made according to the value of the land.

See the observation of *Atkins*, J. on *Wilmot's* argument, in 2 Mod. 6.

[ \* 190 ]

But it was argued by *Jones*, that the verdict hath well found for the avowant; for the substance of the issue is, whether or no the plaintiff held by heriot, and so consequently, whether there were sufficient cause to distrain; and the substance being found it is well. Dy. 115. Hob. 72. Moor, 863. Yelv. 148. 9 Co. 76.

1 Roll. 711.

2. Here the plaintiff and defendant are agreed of the tenure by 12s. 4d. and therefore the finding of the jury contrary to their agreement is not material. 28 Ass. pl. 17. 47 Ed. 3, 19. 18 Ed. 3, 53. Dy. 24. And all the four judges, for these reasons, were clearly of opinion that judgment ought to be given for the avowant.

1 Roll. 690.

## SMITH v. FETHERWELL.—In C. B.

( C. 194. )

S. C. 2 Mod. 6.

It was held, that the lord of a manor may license any man to put in his cattle into a common where others have common, but it ought not to be to the prejudice of the com-

The lord of a manor may license a stranger to put his cattle

on the common, leaving sufficient common for the commoners; and a plea, justifying under such a licence in an action by a commoner, must aver that sufficient was left. Such a licence *pro hac vice* may be without deed: *secus*, if it be for a time certain. A licence to put in *averia sua* extends to all sorts of cattle, as hogs; &c.

moners, but that they should have sufficient common, otherwise any commoner may have a special action of the case (a).

2. It was held, that if the lord grant leave to another to put in *averia sua*, it shall extend to all sorts of cattle, as well hogs as others; and so when a man declares for trespass *cum averiis*, he may particularize in hogs.

3. It was held that a man may justify putting in his cattle *hac vice* by a licence, without saying it was by deed; but if it be a licence to put in his cattle a certain time, it must be by deed, for that is tantamount to a grant of common. 2 Rol. Rep. 147 (b).

4. In this case, when the plaintiff brings an action for putting in his cattle, whereby his common could not be enjoyed *tam amplo*, &c. and the defendant pleads the licence of the lord, he ought to aver, that there was sufficient common left (c).

(a) See notes to *Mellor v. Spateman*, 1 Saund. 346 b. *Atkinson v. Teasdale*, 3 Wilson, 278. 2 W. Bl. 817. *Greenhow v. Isley*, Willes, 619.

(b) See *Monk v. Butler*, Cro. Jac. 575. *Rumsey v. Rawson*, 1 Ventr. 25.

*Hopkins v. Robinson*, 2 Lev. 2. S. C. 2 Saund. 328, and note (12), *ibid.* *Fentiman v. Smith*, 4 East, 107.

(c) See the authorities referred to in note (a), *ante*.

In case against the coroners of the county palatine of Lancaster for a false return to a *capias utlagatum*, the venue may be in Middlesex. *Ante*, p. 6. And all the coroners shall be sued, for they make but one officer.

NAYLER brought an action of the case against the four coroners of the county palatine of Lancaster, and declared, that whereas J. S. was outlawed at his suit, after judgment, a *capias utlagat'* was delivered to the chancellor, who delivered it to the coroners, who were to make their return to the chancellor; and the coroners, notwithstanding they might easily have arrested him, and that he was once in company with one of them, falsely returned a *non est inventus*, and he to the Court; *per quod*, &c. After verdict for the plaintiff, it was moved by *Baldwin* in arrest of judgment, that this action being laid in Middlesex, was not laid in the proper county, but ought to have been laid in the county of Lancaster; for this differs from the cases put in *Bulwer's* case, Co. Rep. and from the ordinary cases of escapes, &c. for here the coroners were not to make their return to this Court, but to the chancellor in the county.

But to that the Court answered, that the tort was the coming of the false return to this Court, and here the writ issued out, &c. and so it was laid here well enough (a).

[ \* 192 ] Another objection was, that the action ought not to be brought against all the coroners; for it is said the writ \* was

(a) The action is transitory, *Griffith v. Walker*, 1 Wilson, 336.

delivered but to one; and it was alleged that the party was in company with one of them, &c.

To that it was answered, though they are four in number, yet they are but one officer; and besides, they all joined in making the false return, which gives the cause of action: and they compared it to the sheriffs of London, where, although the writ be delivered to one of them only, yet if he suffers an escape, they shall both be sued (*b*).

F. N. B. 381,  
n. (c), 8th edit.  
16 Viner, 105-6.

*Turner* said,—If the action were laid in a wrong county, yet it was holpen by the statute of the 16th of this king; *sed tota Curia negavit*; for that statute helps not, if it be not laid in the proper county. *Jud' pro quer' nisi*.

*Sed vid. cont.*  
*ante*, p. 33, C. 42.

(*b*) *Boson v. Sandford*, 2 Salk. 440. 1 Show. 105. *Schuldarn v. Bunness*, Cowp. 192.

### KERBY'S, *alias* KIRK'S CASE.

( C. 196. )

S. C. under the name of *Bird* (or *Keen*) v. *Kirby*, 1 Mod. 199. 2 Mod. 32. Cart. 237.

THE case was, there was a copyholder for life, the remainder in fee; the copyholder for life suffers a recovery in the court baron of the fee. There were two questions, 1. Whether this was a forfeiture or extinguishment of his copyhold estate for life; and for that it was conceived to be a forfeiture. *Sed Atkins dubitavit*, because the lord is party and privy to every recovery suffered in his court (*a*).

*Quare*, whether a recovery of the fee, suffered in the court baron by a copyholder for life, be a forfeiture? Admitting it to be a forfeiture, the lord (and not the remainder-man) shall take advantage; and hold for the life of the copyholder. 6 Viner, 128.

*2d Quest.* Admitting it be a forfeiture, who shall take the benefit of it, the lord or the remainder-man? and for that it was conceived that the lord should hold it during the life of him that committed the forfeiture. 9 Co. 107. 2 Rolle, 794. Godb. 101 (*b*).

Cro. Eliz. 498. When the custom of a manor warrants only estates for lives, the surrenderee, after admittance, is in under the lord. 1 Mod. 200. 4 Co. 27. Cro. Car. 205.

*North*, Chief Justice, took this difference—Where the custom of a manor warrants only estates for lives, there, if a copyholder for life surrender to the use of another, whom the lord admits accordingly, there the *cestuy que use* comes in under the lord, and is not in by the copyholder, for this is but changing a life; and therefore, if *cestuy que use* die, the lord shall have it during the life of him that surrenders: but if the custom of the manor warrants a greater estate, as a remainder in fee, &c. there it may be otherwise (*c*): and it was said in this case, that if the lord grants the freehold of a copyhold to another, the copyholder shall be attendant to the grantee for all things but suit of court, and that is lost.

If the lord grants the freehold of a copyhold, the copyholder is attendant on the grantee for all things but suit of court, which is lost. 4 Co. 26. Watk.

Gilb. Ten. 209, 431.

(*a*) According to the other reports, the recovery was held to be no forfeiture, without a special custom. See Watk. Gilb. Ten. 235, 443. *Contra*. Co. Copyh. § 57.

(*b*) *Strode v. Dennison*, 3 Lev. 94. *Doe v. Clements*, 2 Maul. & Sel. 68. (*c*) 1 Rol. Ab. 627. 1 Ld. Ray. 627. 2 Vcs. Senr. 257. 5 Burr. 2786.

### SQUIB v. HOLT.

S. C. 2 Mod. 29.

ESCAPE was brought; and upon not guilty pleaded the jury found a special verdict, that the plaintiff arrested one J. S.

In an action for an escape brought against

[ \* 193 ]

( C. 197. )

the officer of an inferior court by the plaintiff below, the officer may excuse himself by shewing that the original cause of action arose without the inferior jurisdiction. And (*per North, C. J.*) in such a case, if the kind of action is cognizable there, the officer shall not be liable to an action for executing the process of the court, 10 Co. 76.

2 Lutw. 1567.

1 Roll. 545.

*Post*, p. 260, 266, 294, 320, 356, 1 Ld. Ray. 229. Willes, 30. 4 Taunt. 48. 3 Term Rep. 185, 6 Term Rep. 245.

(1) Lutw. 937. Willes, 36.

[ \* 194 ]

by a process out of an inferior court (*scil. Evil Court*) and the said J. S. being in the custody of the bailiff, he declared against him upon a bond, and laid it to be made *infra jurisdictionem Curie*; and the party pleaded *non est factum*, and afterwards escaped; and they found the bond to be made out of the jurisdiction of the court at Dorchester.

And the question was, whether or no the officer was liable to this action, or whether the proceedings were *coram non judice*? and then he should not be liable.

And it was argued *per Maynard pro quer'* upon this difference, that where an inferior court hath not cognisance of such a kind of action as is brought, there all the proceedings are void, and *coram non judice*; but where it hath cognisance of the kind of action, but by reason of some circumstance it hath not cognisance of the matter, as for locality, &c. where the action is not within their jurisdiction, there, if the party doth not plead to the jurisdiction, but admits it by pleading to the action, the proceedings are not *coram non judice*; but whatsoever the officer doth in pursuance thereupon he shall be excusable. 2 Inst. 229, cap. 35. 10 Co. 76.

*Barton pro def'* argued that the proceedings were *coram non judice*, and so the action would not lie; and for that he cited the case of *Richardson and Barnard*, 1 Rolle, 809.

*North*, Chief Justice, said, that although the proceedings in this case (the action being of such kind as was cognisable in that court) should not be said to be *coram non judice*, so as to have made the bailiff or officer subject to an action of false imprisonment for executing the process of the court; yet he conceived, that as this case is, it shall be said to be *coram non judice* as to the plaintiff, to excuse the officer from his action, because it was a thing that lay in his cognisance, that the bond was made out of the jurisdiction of the court; and so the court had nothing to do with it; but perhaps if an executor (1) had brought the action, it might have been otherwise, because he shall not be presumed to know where the bond was made: and although \* the party had admitted the jurisdiction of the court by his plea, yet the jury here finding that the bond was made out of their jurisdiction, it now appears to be a cause with which they ought not to have meddled; and the other judges seemed to agree with him. *Sed adjournatur (a)*.

(a) Judgment for the defendant, by the opinion of the Chief Justice, *Wyndham and Atkyns*; *Ellis, J. dissent. in omnibus*. S. C. 2 Mod. 30, 31. But see a contrary decision in *Lucking v. Denning*, 1 Salk. 201. *Higginson v. Sheif*, Comyn Rep. 153. And see further, *post*, p. 260, 315-7, 320, 322, 396, 407,

491, 492. 3 Kebl. 849. 2 Salk. 700. Carth. 148. Lutw. 934, 1560, &c. 1 Ld. Ray. 229. 1 Wils. 255. 8 Term Rep. 127. 2 Saund. 101 y. z. notes. 10 Vin. 99. Com. Dig. Courts, P. 15. Bac. Ab. Sheriff, (M) 2. *Michelson v. Causey*, 6 Mod. 72. *Anon.* 2 Show. 374. *Briscoe v. Stephens*, 2 Bingh. 218-9.

## HAYES v. BICKERSTAFF.

( C. 198. )

S. C. 2 Mod. 34.

A LESSEE covenants to pay the rent, and to repair, &c. and the lessor covenants that the lessee, paying and performing all rents and covenants, should quietly enjoy, without any disturbance by the D. of Richmond, &c. The lessee brings an action upon a bond to perform covenants, and assigns a breach for disturbance by the duke: the lessor pleads that the lessee had not paid the rent at the day. The question was, whether or no these words, paying and performing, did make a condition; so that if the lessee did not pay and perform, the lessor was not obliged to make good his covenants.

The lesser covenants that "the lessee, paying and performing all rents and covenants, shall quietly enjoy," &c. Held, that the words "paying and performing," do not make a condition precedent to the quiet enjoyment. T. Jo. 206. Sid. 280. 10 Mod. 153, 189, 222. 2 Show. 202. Willes, 153, 490. 8 Term Rep. 366. 2 W. Bl. 1312. 5 Viner, 55. Post, C. 546.

*Pemberton pro quer'*—It is not conditional, but they are mutual covenants, and the parties have mutual remedies: he admitted, that where a liberty was granted to take such a thing, paying so many hens, there if the party did not pay the hens the grant was void, because the other had no remedy for the hens: and he cited the case of *Ambrose Bennett*, adjudged in the King's Bench, which was the very same with this case, and there ruled by all the Judges; and he cited *Ovo. 54*, which he said was a stronger case, being in a will. [1 Roll. 414. 4 Leon. 50. Sty. 481. Post, C. 199.]

*Burrell pro def'*—If it be not a qualification, the words are totally void.

*North*, Chief Justice, remembered the case of *A. Bennett*, cited by *Pemberton*, and said it would be very mischievous if it should be otherwise; for this clause is now so usual, that it is but *clausula clericorum*, and he said, if it should be construed conditionally, then if the lessee broke a covenant of the value of a penny, it would excuse the lessor of the breach of a covenant of 1000*l.* value.

And he said, though at the first putting these words into leases they might have a conditional signification, yet now he said they were so usual that they were almost matter of form: and he said the case of *Hen* and *Harrison* (1) he remembered adjudged in the King's Bench, where it was \*held, that a lessor having made a release of all demands, had not released his rent-service, which is contrary to Littleton, [sect. 510]; but *distinguenda sunt tempora*, for now it is the form of a general release to put it in, and no such extent intended: but in the principal case it was held, that if he had covenanted upon an express condition, there, unless the lessee had performed the condition, he had not been bound by his covenant. *Cur' adv' vult* (b).

(1) S. C. 1 Sid. 141. 1 Lev. 99.

[ \* 195 ]

A release by general words will be restrained by the intention of the parties (a).

(a) Harg. & Butl. Co. Lit. 291 b. note. 3 Lev. 274. 1 Ld. Ray. 235. Bac. Ab. Release, (K). 4 Maul. & Sel. 423. 2 Brod. & Bing. 49. And see post, C. 470,

306, 649. Fonbl. Treat. of Eq. B. 1, c. 6, § 16.

(b) Judgment for the plaintiff, *Atkyns*, J. *subtente*. S. C. 2 Mod. 35.



( C. 199. )

SMITH v. SHELbury.

S. C. 2 Mod. 33.

Where the defendant promises to pay money in consideration of a promise by the plaintiff to assign a lease to him, the assignment is not a condition precedent to the payment of the money. Sty. 481. *Ante*, Case 198. Com. Dig. Pleader, C. 54. 1 Wilson, 88.

In personal contracts the party is not bound to deliver goods till he have the money, unless a day be fixed for payment (a).

THE plaintiff sets forth, that there was an agreement between him and the defendant, that he should make the defendant an assignment of such a lease; and that the defendant *proinde* should pay him 10*l*. and in consideration that he promised to make the assignment, the defendant promised him 10*l*.

The defendant pleads, that he had not made the assignment, and thereupon the plaintiff demurs. The question was, whether or no the making of the assignment ought to precede the payment of the money, or whether these were not mutual promises, for which they had mutual remedies? and to that opinion the Court inclined, and that here was no condition precedent. Dy. 76. Hob. 41. 7 Co. *Ughtred's* case. And in this case it was agreed, that in all personal contracts the party is not bound to deliver his goods till he have the money, unless there be a day expressly agreed upon for the payment of the money: but in this case they held, that *proinde* made no condition precedent, but only specified the consideration.

(a) See the notes by Serjt. Williams to *ers v. Opie*, 2 Saund. 350; and *Thorpe v. Thorpe*, 1 Ld. Ray. 666. Lutw. 252. *Pordage v. Cole*, 1 Saund. 320; and *Pest-*

( C. 200. )

MILWARD v. INGRAM.

S. C. 1 Mod. 205. 2 Mod. 43.

In *indebitatus assumpsit* it is a good plea in discharge to say that the parties came to an account, and that the plaintiff dis-

THE plaintiff declares upon a *quantum meruit*, and an *indebitatus assumpsit*.

The defendant pleads, that after the said promises, he and the plaintiff came to an account for all reckonings between them, and that he was found in arrear to the plaintiff 3*s*. and that in consideration he would promise to pay the plaintiff the said 3*s*. he did discharge him of the said promises.

[ \* 196 ]

charged the defendant in consideration of a promise by the defendant to pay the balance.

\* The question was, whether or no this was a good plea? and argued that it was not; for though a promise may be discharged by parol, yet an *indebitatus*, which is in the nature of a debt, cannot; and then this plea is but in the nature of an accord, and then no satisfaction being pleaded, it is naught.

A promise may be discharged by parol before breach, but not after. Cro. Car. 384. 12 Mod. 538. *Post*, p. 230. 3 Lev. 238. Bull. N. P. 152. Bacon's Tracts, p. 91.

*North*, Chief Justice, said, he always took the law to be, that a promise might be discharged by parol before it was broke, but not afterwards, for then the plaintiff is intitled to an action. *Atkins* said it is held in Rolle's Reports, *Blackread v. Coke*, 43, that a debt cannot be discharged by parol. *Et adjournatur*. *Sed postea judgement fuit done pro def' pur reason del account, ut audiui de M. Townsend* (a).

(a) In *May v. King*, 12 Mod. 537. S. C. 1 Ld. Ray. 680, where the above case was cited, Lord Holt said, that "it was the first of the kind, and by his consent should be the last." And in *Athcrley v. Evans*, Sayer, 271, it is said to



have been "frequently denied." And see *Roades v. Barnes*, 1 Burr. 9. S. C. 1 W. Bl. 65. *Mayor &c. of Scarborough v. Butler*, 3 Lev. 238. Com. Dig. Plead-er, 2 G. 11. An account stated and the balance paid is a discharge. 1 Rol. Ab. 471, l. 5. Co. Lit. 212 b. *Sed vid. Sayer*, 269. An account stated and a negotiable security given for the sum found in arrear, is a good plea. *Richardson v. Rickman*, 5 Term Rep. 517. 3 Wentworth's Pleadings, p. 139.

## DE TERM. S. TRINITATIS, 1675.

[ 197 ]

IN COMMUNI BANCO.

THE KING v. TURVILL and the BISHOP OF LINCOLN.

( C. 201. )

S. C. 2 Mod. 52.

THE case was this:—Turvill the patron presents by simony A. and then A. dies, and then he presents B. and then the king presents; and then comes the act of general pardon in the 25th of this king, wherein there is a clause of restitution of forfeitures, &c.

The king presents to a church vacated by simony, and then a general Act of pardon is passed, containing a restitution of forfeitures, &c. *Semb.* the right of the patron to present is not restored by the pardon.

The question was, whether or no this had restored the patron to his right of presenting? and it was argued by *Wil-*  
*mot*, that it had not; and he held,

1. That a simoniacal presentation was *ipso facto* void, without any deprivation. 2 Cro. 573, 385.

2. That a contract made when the incumbent lies *in extremis*, is simony; for the case here was, that the guardian of the infant patron made the contract, which was held to be simony *per Curiam*. Win. 63.

3. Though the party simoniacally presented died, yet that being a void presentation did not satisfy the king's turn. Hob. 166.

4. It is made a question, Whether simony may be pardoned, Ow. 87, *Smith's* case; but that the Court would not suffer to be argued, but that it might.

Simony may be pardoned, but the consequent disability remains. Co. Lit. 120 a. 2 Hawk. c. 37, § 56, and § 26.

5. Though the simony be pardoned, yet the consequences of it may not be pardoned. 6 Ed. 4, 4. 8 H. 4, 21. Bro. 103. Cro. Eliz. 686.

6. This presentment being vested in the king shall not be divested by the pardon. 37 Ass. pl. 7. 27 Ed. 3, 81, 85.

Simony is not within the words nor meaning of the pardon. Roll. 334. Cro. Car. 350, and if it should be pardoned, here is no restitution. Cro. Car. 330, 331. 41 Ass. pl. 25.

\* *Nudigate pro def*—Where the fact is pardoned, the consequences are also. Plow. 401. 6 Co. 13. 9 Co. 119. Dy. 123. And the relation of a pardon by act of parliament hath a violent operation. 3 H. 7, 15. 11 H. 7, 22. Bro. Tresp. 425. Dy. Cas. ult. 5 Co. Lord *Windsor's* case. Nat. Brev. 33. A chattel vested in the king is not restored by a pardon.

[ \* 198 ]

Dy. 300. The king may grant the presentation when the church is void, and restitutions shall be taken liberally; as, 8 Co. 56, Earl of *Rutland's* case, it is much to the dishonour of the king to avoid his patents by nice constructions.

A simoniacal contract by the guardian of an infant patron will avoid the presentation.

A simoniacal presentation is void *ipso facto*. Hob. 168.

(1) 1 Sid. 170, 220.

(2) 1 Saund. 360. *Ante*, p. 41.

The king may revoke his presentation by express words (a).

*North, Ch. J.*—It is very plain, that this contract, made by the guardian in the behalf of the infant, makes the presentation simoniacal. 2. A presentation by simony doth not fill the church, but it is void *ipso facto*; so that the king's turn is not gone by the death of the simoniacal presentee, but by the death of the former incumbent. 3. In case of simony, though the king doth pardon the simony, yet the disability remains still upon the person, and renders him incapable of the benefice; as was resolved in the case of *Philips* and *Drite* lately (1); and there were two cases cited, lately adjudged in the King's Bench; one was in the case of *Tombes* and *Darcy* (2), where an administrator of *felo de se* brought a *Sci' fa'* upon a recognizance, and the case was, that after an inquisition found there came a pardon; and it was held, that this had not restored the administratrix to her *Sci' fa'*, because by the inquisition the right was vested in the king, and so was not restored by the pardon; but if the act of pardon had come before the inquisition, then the administratrix had been restored to the right of action; as was held in the case of *The King and Ward*, *vide* Cro. Eliz. 686. And the Court was divided in opinion; but that which made the difficulty of the case was, because the king had presented here before the act of pardon; and although the king may revoke his presentation by express words; yet whether or no the general words of restitution contained in the pardon shall amount to a revoking of the presentation, and a restoring of the patron to his right of presenting, is the great question. *Et adjournatur* (b).

(a) The king may revoke before induction, and a common person before institution. Co. Lit. 344 b. Com. Dig. Eglise, H. 10. *Attorney General v. Wycliffe*, 1 Ves. Senr. 80. *Rogers v. Halled*, 2 W. Bl. 1039. 1 Burn's Eccl. Law, p. 150-1, 8th edit.

(b) According to the report in Mod.

Rep. the Court were all ultimately of opinion, that the Act of pardon did not divest the title of the king's presentee, nor operate as a revoking of his presentation. A writ of error was brought, but the matter was terminated by agreement.

( C. 202. )

SKEDWIN v. LAMPEN.

*Semb. S. C. Lepping v. Kedgewin*, 1 Mod. 207. *Rozal v. Lampen*, 2 Mod. 42.

A former judgment against the

[ \* 199 ]

plaintiff is no bar to a second action for the same cause, if it appears on the record to have been given for the insufficiency of the declaration, although erroneously en-

THE plaintiff formerly brought an action upon the Case against the defendant (an attorney) for appearing for him in a suit without any warrant; and sets forth, \* how that judgment being obtained against him, a *fi' fa'* issued out of this Court, and 22*l.* was levied upon his goods, but alleges no place where this *fi' fa'* was executed.

The defendant to that action pleaded a frivolous plea, *scil.* that J. S. gave him a warrant to appear in the said suit for the plaintiff. And the plaintiff demurred. And because he had omitted the place in his declaration, judgment was given against him; but the judgment was entered *quod placitum prædicti (defendentis) sufficiens in lege existit ad præcludend'*,

*&c.* whereas in truth the judgment was not given, because the defendant had pleaded a good bar, but because the plaintiff had insufficiently declared. tered as if he had been barred by the plea.

And now the plaintiff brings an action of conspiracy against the defendant, and alleges that he, together with one W. N. contriving to charge the plaintiff, did appear in the before mentioned suit without any warrant.

The defendant now pleads the former judgment, and avers, that this action was for the same cause. And the plaintiff demurred.

And it was argued by *Shafto pro quer'*—

1. That where there is a substantial variance, a former action is not pleadable. 1 Roll. 391, 354.

2. Where the former action is misconceived, it shall not be pleadable. 5 Co. *Robinson's* case.

3. Where a judgment is not well entered, it is not pleadable. 2 Cro. 284.

4. Where the declaration is not good, and the plaintiff for that is barred. 4 Co. 40, Case of appeal.

*Barton pro def'*—And he relied upon *Ferrer's* case, 6 Co. 7, where a man hath been once barred, he shall be barred of all actions of like nature; and so though they be of a higher nature. 4 Co. 43. 1 Leon. 318.

But the Court all were of opinion, that this was no good bar, the former judgment being given upon the insufficiency of the first declaration; for although the defendant pleaded, yet that plea being frivolous is as if it had never been pleaded, and so shall not stand in the way; and though the judgment be entered, as though he had been barred by the plea, yet it appearing upon the whole record, that judgment was given upon the insufficiency of the first declaration, it shall not be now pleadable; and though the plaintiff demurred upon the former plea, yet that being a bad plea, the demurrer is no confession of it<sup>(1)</sup>; for a demurrer is a confession only of that which is well pleaded. *Jud' nisi* (a).

(1) *Ante*, p. 39. 7 Viner, 525. 5 Co. 69.

(a) See *Level v. Hall*, Cro. Jac. 284. 3 Wils. 304-9. Bac. Ab. Pleas and Pleading, (I), 13. 14 Viner, 610. Com. Dig. Prac. Reg. 132-3, 2d edit. *Hitchin v. Campbell*, 2 W. Bl. 827, 831. S. C.

## DE TERM. S. MICHAELIS, 1675.

[ 200 ]

IN COMMUNI BANCO.

HILL v. PHEASANT.

( C. 203. )

S. C. 2 Mod. 54.

**DEBT** upon an obligation for payment of 60*l*. The defendant pleads the statute of 16 Car. 2, 7, and says, that the plaintiff and he were at play together, and that he lost 80*l*. A. lost 80*l*. to B. at play, for which he gave his bond: the

parties then agreed to meet and play again shortly, which they accordingly did about two days after, when A. lost 60*l.* more to B. for which he gave another bond. *Quære*, whether this was a loss of more than 100*l.* at one time or meeting within the statute 16 Car. 2, c. 7? *Semb.* If the separation had been agreed upon by collusion, to evade the statute, the case would have [ \* 201 ] been within it.

Acc. Hardr. 56, 477, and *vid.* Hargrave's Tracts, p. 119, 120.

(1) *Quære*, *Danvers v. Thistlethwaite*? 1 Lev. 244. 1 Sld. 394, cited, *post*, p. 432. 1 Salk. 345.

to the plaintiff, for which he gave him bond, and that *tunc et ibidem* it was agreed, that they should play again *infra breve tempus*; and thereupon about two days after they met and played again, and then the plaintiff won 60*l.* more of the defendant, for which this bond was given; and upon this plea the plaintiff demurs.

And the question was, whether or no this playing a second time, pursuant to an agreement made at the first time when the 80*l.* was lost, should be all one as though all had been at one time; there being no averment of any fraud to evade the statute?

And *Windham* and *Atkins* held that it should; and that here was fraud apparent to elude the statute; and they said, they could see no difference between this case and the case of *Edgbury* and *Rossender* in the King's Bench, Term. Mich. 1675 (a); where the case was, that articles were made for horse-racing; and it was agreed, that they should run the 1st of July for 50*l.* and the 3d of July for 50*l.* more, and the 6th of July for 50*l.* more. And an action being brought for the first \* 50*l.* it was held by the Judges of the King's Bench, that it was a security within the statute, and was void for all; for though the race was to be run at several days, yet it being pursuant to the original agreement, which included all, it was held all one as though it had been all to have been upon one day. And *Atkins* said, that this was like a case which frequently happened in the Exchequer, which was, the king having the duty of prisage of wines, which was one tun in ten, if a merchant bought twenty tuns of wines, and would bring over nine tuns at one time, and nine tuns at another, to evade the statute, this the Court looked upon as a fraud apparent to cheat the king, and constantly decreed the payment of it.

*North*, Ch. J. and *Ellis* held the contrary, that this could not be within the statute, there being no averment, that this agreement was made by collusion; for here the playing being at two distinct days cannot be within the statute, which says *at the same time or meeting*; and this agreement to play again is no more than what is ordinary amongst gamesters, as to say "we'll meet again," &c. and by the same reason as this is within the statute, so a whole winter's gaming may be knit together and brought within the statute, which certainly was never intended; but the design of the statute was, that men should not in the heat of play undo themselves, by giving securities for money so lost; for it is plain, if a man hath ready money, he may lose as much as he will; and if he gives security for any sum under 100*l.*, it will be good too, as was held in one *Micklethwaite's* (1) case in the King's Bench; as if a man loses 100*l.* ready money, and gives security for 50*l.* more, this is not within the statute; *ad quod tota Curia* assented. And they held the law to be as was alleged in *Edgbury's* case; because there, although the races were run at several days, yet all was by reason of the first agreement,

(a) See S. C. *post*, p. 358. 2 Lev. 94. 1 Ventr. 253.

which was in that case compulsory; for if either party had refused, in that case the other might have had his action; but here was no such agreement as either party might have had an action for, but only a discourse of playing again.

And so, the Court being divided in opinion, the plaintiff prayed leave to discontinue; because he said, that he did not win the 80*l.* as the defendant had alleged, but only he thought his demurrer had been clear, or else he would have taken issue upon that. And thereupon the Court gave him leave to discontinue (*b*).

(*b*) "The better opinion was, that the case was *not* within the statute." See *S. C. Mod. Rep.* See further, *post*, p. 421. *Hudson v. Malin*, *post*, p. 432. *Walker v. Walker*, 12 Mod. 258. *Crouch's* case, *ibid.* 336. *Rostington's case*, 3 Salk. 175. *Anonymous*, 1 Salk. 345. *Stanhope v. Smith*, 5 Mod. 351. *Bones v. Booth*, 2 W. Bl. 1226, and 9 Ann. c. 14. Bac. Ab. Gaming, (B).

[ 202 ]  
( C. 204. )

### WILSON v. DUCKETT.

*S. C.* 2 Mod. 61.

TRESPASS for taking away several sheaves and shocks of corn.

The defendant justified as a distress for rent arrear.

The sole question was, whether corn in sheaf or shock was distrainable for rent?

*Jones* argued *pro quer'* that it was not; and took these differences:

1. Sheaves or shocks of corn may be distrained damage-feasant, but not for rent.

2. Corn in a cart may be distrained, but not in the sheaf or shock, for rent; and the reasons are, 1. Because a distress must be taken only of such things as may be known, to the intent that a replevin may be made; and therefore money out of a bag cannot be distrained; because it cannot be known from other money. 2. It must be of such things that may be returned in the same plight in which they were taken; and all this appears in 18 Ed. 3, 4. 2 H. 4, 15. 22 E. 4, 50. 11 H. 7, 17. 21 H. 7, 39. 1 Inst. 47, where the other authorities are cited. 1 Roll. 667, adjudged in the case of *Hay*. [Jon. 197.]

*Baldwin pro def'* said, that point was so clear that he could not dispute it; and so said all the Court. But *Baldwin* desired a day's time to speak to the declaration.

Corn in sheaf or shock is not distrainable for rent arrear. [But now see stat. 2 W. & M. c. 5.]

Sheaves or shocks may be distrained damage-feasant. 9 Viner, 121. Corn in a cart is distrainable for rent at common law. 2 Inst. 82. 9 Vin. 138. 3 Black. Com. 9, 10.

### SNOW v. SIR WILLIAM WISEMAN.

*S. C.* 2 Mod. 60.

TRESPASS for taking his horse. The defendant says, that J. S. was seised of Black Acre, which he held of him by a heriot, and that he died seised, and so he seised this horse *ut optimum animal*.

The plaintiff replies, that J. S. and he were jointly seised, and the estate did accrue to him *per jus accrescendi*; and doth not traverse that J. S. was sole seised at the time of his death. And for that the defendant demurs generally.

When a seisin is alleged generally, a sole seisin shall be intended. Acc. 2 Salk. 629. Where the defendant alleges a seisin in J. S. and the plaintiff replies a joint

( C. 205. )



seisin, he must traverse that J.S. was sole seised. 2 Salk. 629. 2 Saund. 9 c, note (14). Com. Dig. Pleader, G. 2, G. 13. 20 Vin. 379.

[ \*203 ]

1 Ld. Ray. 355. Com. Dig. Pleader, G. 13. Heath's Max. 77-8-9, edit. 1771.

Omission of a special traverse in a replication is matter of substance. Cont. 1. Leon. 43. Acc. Com. Dig. Pleader, G. 22. Hob. 233. Bac. Ab. Pleas, (H), 3. Carth. 166. 3 Salk. 355. Vid. 4 Ann. c. 16, § 1.

( C. 206. )

Held, that the stat. 14 Car. 2, c. 2, regulating the choice of scavengers, destroyed the custom of choosing in the borough of Southwark. Semb. cont. Com. Dig. Parliament, R. 24. Semb. an affirmative statute, introductory of a new law, will destroy inconsistent customs.

1. It was agreed, that when a dying seised is alleged generally, it shall be intended a sole seisin.

But the sole question was, whether or no plaintiff should not have traversed the sole seisin?

*Bramston* argued that he ought; for else here are only two affirmatives, and yet no confessing nor avoiding neither, and two affirmatives cannot make any issue; and he cited \*22 H. 6, 23. 1 Bulst. 48. 5 H. 7, 10, 11. And he said, there was a great difference between joint-tenancy pleaded in the bar, where a sole seisin is alleged in a count or declaration; and when it is in the replication, when a sole seisin is alleged in the bar; for the count is but as supposal, and so need not be traversed, as the bar must, where it is contradicted; because the bar must be more certainly and positively alleged; and he cited 1 Ed. 4, 9. Bro. Trav. 279. Yelv. 140, 141. Cro. Eliz. 230.

*Coniers* argued, that the replication was good without a traverse; and he cited Yelv. 221, 31. 2 Cro. 221. Dy. 32. Plow. 230.

Another thing was moved, whether the omitting of the traverse, admitting it ought to be taken, was matter of form, or matter of substance? And to that *North*, C. J., said, he had always taken the law to be, that when you come to the replication, the omitting of a traverse, where it ought to be taken, was matter of substance; for if they should not be bound to traverse, they might plead on *ad infinitum*. And he said, so he had often seen it ruled in the King's Bench, that *hoc paratus est verificare* instead of *hoc petit quod inquiratur per patriam*, or *de hoc ponit se super patriam*, was matter of substance.

SUR LE STAT. 14 CAR. 2, 2.

S. C. 2 Mod. 39.

THE question was, whether that statute, being an affirmative law for the election of scavengers, had taken away a custom in the borough of Southwark?

And it was held by *North*, *Atkins*, and *Windham*, that it had destroyed the custom; the authorities cited, where affirmative acts should not destroy customs, were Dy. 19, 50. Cro. Eliz. 125. 2 Leon. 74. 1 Inst. 115. 23 H. 8, 5. 11 Co. 59, 64. Moor, 113. Hob. 173. And they seemed to take a difference, that where a statute is introductory of a new law, there it shall take away all contrary customs, though there be only affirmative words; but if there were a law before, that shall not be destroyed by affirmative words (a).

And though an opinion hath prevailed, that, notwithstanding the statute of Magna Charta, where there is a custom for holding leets at other times than are mentioned in the

(a) 2 Inst. 200. 1 Show. 420. Show. Parl. Ca. 174-5. *Rex v. Sparrow*, 2 Stra. 1123-4. *Ex parte Carruthers*, 9 East,

44. *Warden &c. of St. Paul's v. The Dean*, 4 Price, 65. And see, generally, Bac. Ab. tit. Statute (G).



statute, it shall be well enough, and so the law is taken; but *North* said, if that statute were to be construed now, it would hardly be so taken. Cro. El. 125.  
2 Inst. 72.

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WARD v. BENT.

[ 204 ]  
( C. 207. )

**TRESPASS** for taking his horses. The defendant justifies by virtue of a recovery in an hundred court before J. S. *Seneschallum Domini Regis*, and that a *Levari facias* issued out, and by virtue thereof he *prout minister Curie* did seize the horses upon that execution.

The title of the owner of a Hundred Court cannot be questioned in an action of trespass against the officer for executing its process. *Ante*, p. 193.  
*Post*, p. 356.  
Buller N.P. 133.  
*Quere*, what hundreds were annexed to the sheriffwicks by 14 Edw. 3, c. 9? Com. Dig. Hundred, A.

The plaintiff replies, and sets forth the statute of 14 E. 3, 9, and avers that this hundred was not granted in fee at the time of making of that statute.

And the question intended was, how far that statute should extend, and what hundreds should be annexed to the sheriffwick by that statute?

These cases were cited, where the king shall not be bound by an act of parliament, 11 Co. 68, 74. Kel. 151. 8 Ed. 3, 8, and other cases, where subjects are taken notice to be owners of hundreds, 14 Ed. 3, 191. 11 H. 4, 8. 8 H. 7, 1. 4 Inst. 267. 4 Co. *Mitten's* case.

*Baldwin, pro quer*, agreed, that the king might have hundreds, and so might a subject; but then they must be such as were in the hands of a subject in fee at the time of the making of that statute. *Atkins* said, my Lord Chief Justice *Hale's* opinion was in this case, that it extends to such only as had been granted out since the statute 10 Ed. 1 (a).

But *per totam Curiam* that cannot come in question here; for here being a court *de facto*, the plaintiff shall not in this action try the title of the owner; and it is all one as if there be a disseisor of a manor, and a recovery in that court baron, the officer may well justify executing the process, for he that is in possession is *Dominus pro tempore* (b); and if they would try the title, it might be by *quo warranto* or action on the case; and for that reason they all gave judgment for the defendant.

(a) *Quere*, if 10 Ed. 1, be not misprinted for 2 Ed. 3, c. 12? See more particularly on the construction of these statutes, 4 Inst. 267. Fitz. Petition, pl. 1. *Sir R. Athyns v. Clare*, 1 Vent. 399. *Cole v. Ireland*, T. Ray. 360. T. Jones, 194. Skin. 41. 2 Show. 98. *Rex v.*

*Kingsmill*, 3 Mod. 199. 7 Vin. 13—16. 14 Vin. 326.

(b) As to the validity of acts done under the authority of the *dominus pro tempore* of a manor, see Harg. Co. Lit. 58 b. note (4). Gilb. Tenures, 204, *et seq.* and *More v. Pitt*, *post*, p. 245.

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HORTON v. BENSON.

( C. 208. )

**RESOLVED**, 1. Where the submission is general and conditional to end all controversies, that an indictment for a battery was not a controversy between the parties within the meaning of the submission; for that is the king's suit, and if the arbi-

An indictment for a battery cannot be referred to arbitration.

## [ \* 205 ]

Award to pay money in a stranger's house is good, for a licence shall be intended (b).

An award "to pay 40s. for a trespass," is good (c).

trators did award the ceasing of such a prosecution, it would be void, because it would be to obstruct justice (a).

\* 2. Money being awarded to be paid in the bishop's palace was well enough, for a licence shall be intended; especially, as it is in this case, where the bishop himself makes the award. Cro. Car. 226. [Plowd. 71, a, b.]

3. Where an award is made to pay 40s. for a trespass, &c. that this is a good award on both sides, because both parties have benefit, one receiving the money, and the other discharged of the wrong. Hob. 49. 1 Roll. 253.

(a) That causes criminal are not arbitrable, see West's Symbol. P. 2, § 33, cited Bac. Abr. Arbitrament, (A). Noy's Maxims, ch. 50, p. 108. Unless the reference be by the recommendation of the Court. *Baker v. Townsend*, 7 Taunt. 422. See further as to the illegality of such compromises, *Collins v. Blantern*, 2 Wilson, 341. *Edgcombe v. Rodd*, 5 East, 298. 4 Bl. Com. 136, n. (3). *Har-*

*vey v. Morgan*, 2 Stark. 17. *Pool v. Bousfield*, 1 Camp. 55. *Fallowes v. Taylor*, 7 Term Rep. 475. *Drage v. Ibberson*, 2 Espin. 643. See, also, Domat's Civil Law, Vol. 1, p. 225; Vol. 2, p. 623, 1st ed. by Strahan.

(b) 3 Bulstr. 40. 3 Lev. 153. 1 Rol. Ab. 247, 249.

(c) *Post*, 266. 1 Lev. 132. 1 Burr. 277-8.

## ( C. 209. )

## SERLE v. BUNNION.

Semb. S. C. 2 Mod. 62.

A tender with a *tout temps prist* cannot be pleaded after a general imparlance. 2 Salk. 622. Carth. 413. Barnes, 351-7, 362, 4to ed. 1 Burr. 59. 1 H. Bl. 369. 1 Saund. 33 b. n. (2). 2 Saund. 2, n. (2). Bac. Ab. Tender, (H), 3. *Aliter*, after a special imparlance. *Ante*, p. 134.

In debt upon a penal obligation a plea of tender is good without an *uncore* and *tout temps prist*.

*Tout temps prist* is pleadable after essoin. Bac. Ab. Tender, (H), pl. 32.

DEBT for rent. The defendant imparles generally, and then pleads *Tout temps prist*. The question was, whether he should be admitted to this plea after a general imparlance.

Argued by *Barrett pro quer'* that he should not; and he cited 16 H. 6, 13. Long 5to Ed. 4, 141. 26 H. 6, 2, and a difference taken between a bare debt and a penalty to pay a debt, as an obligation with a condition; for in that case it shall be sufficient to plead a tender at the day without an *Uncore prist*, without a *Tout temps prist*; there he may plead a tender to perform the condition, without saying that he was always ready; but when it is for a bare debt, there he must plead *Tout temps prist*. Bro. *Tout temps prist*, 40. Dy. 300. 2 Cro. 627.

*Conyers pro def'* cited 21 H. 7, 30. 2 Roll. 523. Bro. Contin. 12.

The Court held this plea could not be pleaded after a general imparlance; for it is contradictory to say he was always ready, and yet to take time to answer to the declaration.

And *North* took a difference between the case cited of an essoin and this of an imparlance; for an essoin is before declaration, and so the defendant doth not know what the plaintiff's charge will be; and therefore he may plead those pleas after essoin which he cannot after a general imparlance; but if it had been a special imparlance, it would have been otherwise, for that saves and reserves the advantage to the defendant; and they agreed the difference between an ob-

ligation with a penalty and a bare debt (a). But *per totam Curiam* the plea here was naught after a general imparlance.

(a) *Vid.* Co. Lit. 207. Heath's Max. 2 & 3. 20 Viner, 306, &c. Com. Dig. p. 87, ed. Cunningh. *Trevett v. Aggas*, Pleader, 2 W. 28. Willea, 107, 111. Bac. Ab. Tender, (H)

SERLE v. BUNNION.

S. C. 2 Mod. 70. 3 Salk. 220.

[ \* 206 ]  
( C. 210. )

TRESPASS for taking his cattle. The defendant pleads, that he was possessed of Black Acre *pro termino diversorum annorum ad tunc ventur'* but sets forth no term in certain, nor the commencement of his lease, &c. and that he took the cattle there damage-feasant.

*North* and *Wyndham* at first seemed to be of opinion, that this was no good plea, being pleaded so uncertainly that the plaintiff could take no issue.

But *Atkins*, Justice, was of the contrary opinion: and his reason was, because possession is a good title against every man that hath not a better [*Post*, p. 221-2]; and therefore it is a sufficient justification in this action, to shew that he was in possession, this being only a transitory action for taking his cattle; but if the plaintiff had declared of breaking his close and taking his cattle, and so declared of a local trespass, that had affirmed the possession in the plaintiff, then the defendant could not have justified but by making title, and then such an uncertain alleging of a term would have been naught. [2 Roll. 553.] [*Sed semble a moy*, that if the plaintiff declares of a local trespass, when *re verá* he is out of possession, the defendant may plead not guilty.]

*North*, Justice, afterwards seemed to incline to *Atkins's* opinion; and said, that it is a case of great importance, for if the law should be contrary, any stranger may put the tenant in possession to set out his title; the authorities cited were, 12 Ed. 4, 12. 2 Roll. 548. 2 Cro. 123. Yelv. 75. Roll. 11, 13. Dy. 289. Bro. Trespass, 38. *Sed adjournatur ad proximum terminum*.

*Note.* In this case *Atkins* held the alleging of a term for years was surplus, and the possession had been a good title without more shewing.

And afterwards, in Easter Term, *North*, C. J. delivered the opinion of the whole Court, that the plea was well enough; and it was not necessary for the defendant in this case to set forth the certainty of his term, the plaintiff declaring of a transitory trespass; but if the plaintiff had declared for breaking his close, then the defendant must have set forth his title in certain; but here it was but like inducement; as where the plaintiff declares for a nuisance, he need not set forth his title in certain, because his title is but inducement. And so judgment was given *pro def' per Cur'*.

In trespass for taking cattle, if the defendant justifies damage-feasant, it is sufficient for the plea to allege possession of the close, without stating a title specially. Acc. 2 Salk. 643. 1 East, 212. 2 Bos. & Pull. 361, n. (a). Note (2) to *Mellor v. Spateman*, 1 Saund. 346. But a plea of justification to trespass *quare claus. freg.* must set forth a title. 2 Salk. 643. 2 Lutw. 1492. 2 Saund. 401. 3 Wila. 72-3.

A particular statement of title is unnecessary in a declaration. Pleader, C. 43.

tion for a nuisance. *Post*, C. 624. Com. Dig.

## DE TERM. PASCHÆ, 1676.

IN COMMUNI BANCO.

( C. 211. )

THE COMPANY OF MERCHANT ADVENTURERS.

The goods of a corporation may be attached in London. See 9 & 10 Will. 3, c. 44, sec. 74.

NOTE; it was held by the Court, after a long argument, that the custom of foreign attachments in London might extend to attach the goods of a corporation, where the corporation were indebted, and had goods in the hands of others. And a *certiorari* being brought to remove such a proceeding in London, a *procedendo* was granted.

( C. 212. )

LEE v. BROWNE.

S. C. 2 Mod. 69. Pollexf. 410.

The king grants a manor, "and every part and parcel, or that is reputed parcel thereof." This reputation is not a question for the jury, but for the court.

THE case was, that Sir F. Fortescue was seised of a manor, and he grants the manor to the Earl of Denbigh, except such lands as were then held for life by copy; afterwards, the inheritance of this copyhold was granted to the Earl of Denbigh; and then the copyholder dies, and the Earl grants by copy again, and then forfeited all to the king; and the king granted the manor, &c. and every part and parcel thereof, or that is reputed parcel thereof. And all this matter being found by the jury, the question was, whether these copyhold lands passed in the king's grant by these words "reputed parcel?" And the Lord Chief Justice *North* delivered the opinion of the whole Court, that they did pass. Whereupon these differences were taken, 1. That this reputation shall not be tried by \* the country, because it is too uncertain for them to try; for it may be reputed so by some persons, and for a short time, &c. 2. It was held, that if in this case the jury had found only that these lands had been reputed parcel of the manor, the Court could not have given judgment; because they had found that which they had not been proper judges of. 3. In this case, where the jury have found the particular matters, and those particulars are a solid ground for a reputation, the Court shall adjudge it reputed parcel, and so shall pass by those words in the grant of the king; *et issint judgment fuit done accord*. Vide Co. Ent. 380, 384 (a).

[ \* 208 ]

(a) According to *R. v. Imber & Wilking*, cited from Co. Ent. the proof of reputation is different in the case of the king and of a common person. S. C. 2 Rol. Ab. 186. In the latter case *reputed parcel* (like *reputed ownership* in bank-

ruptcy, *Horne v. Baker*, 9 East, 215, 241,) seems to be rather a question of fact for the jury. See further, 2 Sid. 1. 1 Lev. 27. 1 Vent. 51. Cro. Car. 169, 308. Savil. 26. Com. Dig. Grant, E. 10, G. 12. 12 Vin. 249. 2 Mod. 235.

( C. 213. )

CROSIER v. TOMLINSON.

S. C. 2 Mod. 71.

The proviso in the Stat. Limitations, 21 Jac. 1,

INDEBITATUS *assumpsit*. The defendant pleads *non assumpsit infra sex annos*. The plaintiff replies, that he was an

infant at the time of the promise made, and came to full age in anno 72.

The defendant demurred, apprehending that this action is not within the proviso that saves the right of infants till they come to their full age, because it is not mentioned there.

*Turner* argued, that if it were not in the words, yet it would be within the meaning; and cited several cases, where acts of parliament shall be construed to extend to things that are not in the letter of the law, when they are in the reason and equity of it (1), 10 Co. 101. *Beufage's* case. 2 And. 57, 150. Cro. Car. 163, 245, 333, 381, 533, 534. 19 H. 8, 11, where this very act is construed by equity to extend to a trover, which, though it be mentioned in the beginning, is not elsewhere.

And all the Court (but *Ellis*) conceived, that it may be well comprised under the word trespass, because it is trespass upon the case; but however it is in the same reason with those mentioned; for it would be strange, that an action of debt should be saved to the infant, and yet that he should be barred of his *indebitatus assumpsit*, which is but another remedy for the same thing. *Vide* Style, 230.

C. 16, saving the rights of infant plaintiffs, extends to actions of *assumpsit*. Acc. 2 Saund. 121. 1 Show. 98. Lutw. 244. 2 Stran. 836.

(1) 2 Mod. 73.

### MAJOR AND BIRD v. SHELBY.

( C. 214. )

S. C. 1 Mod. 214. 2 Mod. 63.

WHERE the matter goes as well in abatement as in bar, it is at the election of the party to plead it in abatement as well as in bar. 10 H. 7, 11. 2 Rol. Rep. 64, *et sic judgment fuit done per Cur' (a)*.

Where the matter goes as well in abatement as in bar, it may be pleaded in abatement or in bar at election.

(a) See Bac. Abr. Abatement, (L). 5, 2 ed. 1 Ld. Ray. 345, 693. 2 Id. But see 3 Salk. 1. 1 Lilly Prac. Reg. p. 1207, 1249.

### DE TERM. S. TRINITATIS, 1676.

[ 209 ]

IN COMMUNI BANCO.

### PAGE v. TURLST.

( C. 215. )

S. C. 1 Mod. 239. 2 Mod. 83.

THE defendant being sheriff of Middlesex returned a *Cepi corpus*, with a *Paratum habeo*, and brought not in the body, but had taken bail, according as is the usual course. The question was, Whether an action upon the case would lie against him or not?

And it was argued by *Stroud* that it would not lie; and he cited Cro. Eliz. 460, 624, 852. 2 Cro. 296.

*Pemberton* for the plaintiff argued, that the action would lie; for although the sheriff may be amerced by the Court for a *Cepi* returned, and not bringing in the body, yet that is no satisfaction to the party, if he do not appear; and the

No action lies against the sheriff for returning *cepi corpus*, &c. when he has let the defendant at large on bail. See *Posterne v. Hanson* & another, 2 Saund. 59. Bac. Ab. Sheriff, (O). 19 Viner, 213-4.

sheriff here is at no mischief, for he may remedy himself by his bond against the bail.

But the Court inclined that the action would not lie; for they said, by the statute of 23 H. 6, the sheriff is compellable to take bail, and he is bound to return a *Cepi*, (for he will not be allowed to return, That he hath took sufficient sureties,) and therefore it would be hard, that an action should lie against him so long as he pursues the statute; and the amerciaments are compulsory upon the sheriff, and the bonds upon the parties, to bring them to appear; and the party may be satisfied by the sheriff's assigning of his bail-bond, which though the Court cannot compel him to \* do(1), yet they will make him weary by amerciaments: and if this action should lie, the sheriff would be in a great dilemma; for if he refuses bail that is sufficient, an action lies against him; (but *per Pemberton*, it must be clearly proved that the bail is very sufficient): and now, if when he hath taken bail, and returned a *Cepi*, which he is bound to do, an action should lie against him, it would be very hard.

[ \* 210 ]  
(1) *Vid.* 4 Ann. c. 16, § 20.

An action lies against the sheriff for refusing sufficient bail. 2 Vent. 96. 2 Mod. 32. 15 East, 320. *Post*, 219.

(2) *Sed vid.* *post*, p. 219.

And it was said by some, that if he took insufficient bail, an action would lie against him(2): but *North* said, he never had known any such action brought. And *Pemberton* could cite no precedent for the principal action. *Et adjournatur usq; Term. Mich.* [*Post*, p. 225.]

### ( C. 216. )

#### LADY THORNBOROUGH.

*Feme covert* discharged from arrest on *mesne* process (a).

SHE being covert (i. e. the wife of Sir Thomas Thornborough) sealed a bond; and being arrested and carried to prison, upon affidavit made that she was covert, and entering her appearance, the Court discharged her without bail.

(a) 1 Term Rep. 468. 1 Barn. & Ald. 165. When not, see 1 Bing. 344.

### ( C. 217. )

#### SIR WILLIAM HICKMAN v. THORNY.

S. C. 2 Mod. 104.

A particular prescription may be controlled by a general custom: therefore, the latter may be pleaded without a traverse of the former. But it is otherwise of inconsistent prescriptions. 2 Leon. 209. Yelv. 217. Carth. 116-7. 1 Wilson, 253. 2 Wilson, 101. 1 Bos. & Pull. 285. Com. Dig. Prescription,

THE defendant avows for damage-feasant in his freehold.

The plaintiff replies, that he was seised of a house and two acres of land in B. and that he prescribes for common belonging to his said house and two acres of land in the field of D. whereof the *locus in quo* was parcel.

The defendant rejoins, that there was a custom in the said field, that any owner of lands might inclose any parcel of land lying together in the said field, and exclude the commoners in the said field.

The plaintiff demurs, and objects, that this rejoinder is naught; because here is a prescription pleaded against a prescription, without traversing the first prescription, which is not good, according to *Aldred's* case, 9 Co. 58. Cro. Car. 432.

But the Court seemed to incline that may be well enough;



for a particular prescription may be controlled by a general custom, though it cannot by another prescription; as in the case where a man prescribes for a way, or for lights, another cannot prescribe to stop them up; for when they were once stopped up there is an end of them: but here is a custom which is of a greater extent and latitude than \*the prescription, there it may be good without traversing the prescription; for if one or two men inclose, yet the party has his common in the residue, and so it may stand with prescription.

But the question made by the Court was, whether or no this were a good custom, as it is here laid? but they agreed Sir *Miles Corbett's* case, 7 Co. 5, and said, that that judgment was affirmed for good law in the case between the Lord *Clare* and Sir *Thomas Williamson*, which was the same case; for it may be a reasonable custom, where several men have several parcels of land lying in a common field, and they common together, to prescribe for inclosure against one another, and to exclude common; for those that are so excluded have the same benefit of inclosure too (a); but when a man prescribes for common appendant to a house and two acres of land, which are not parcel of the field, as the defendant doth here, there it seems to be an unreasonable custom to exclude him, for he cannot have the same advantage against them, especially as it is here; for it doth not appear that this place was parcel of a great commonable field: and the defendant consented to pay costs and mend; for they thought the truth of their case would be the same with Sir *Miles Corbett*, 7 Co. 5, where a man hath lands lying intermixt in a common field where he prescribes for common, there he prescribes for common in all the said field, except his own lands.

(F), 4. 17 Vin. 284-5.  
Jones, 375.  
[ \* 211 ]  
Where several persons have lands lying in a common field, and they prescribe to inter-common together, they may also prescribe to inclose against one another. But where one prescribes for common, appendant to land, not parcel of the field, the owner of the soil cannot prescribe to inclose against him. 2 Mod. 105.

(a) See the remark of Bayley, J. Ald. 712, correcting Com. Dig. Com. in *Cheesman v. Hardham*, 1 Barn. & Mon, E.

## DE TERM. S. MICHAELIS, 1676.

IN COMMUNI BANCO.

[ 212 ]

( C. 218. )

THE delivery of goods to the defendant, if they were goods of the plaintiff, or of a stranger (a), was held a good consideration for an *assumpsit*; but if they were the goods of the defendant, it was held no consideration, because he did no more than by law he was compellable to do (b). This difference was taken by *North*, Chief Justice, *nemine contradicente*.

The delivery of the plaintiff's or a stranger's goods to the defendant, is a good consideration. *Aliter*, if they are the goods of the defendant himself. 1 Rol. 20, 25.

(a) In *assumpsit* for goods sold and delivered, it is unnecessary to allege that they were the goods of the plaintiff. Bull. Ni. Pri. 139. 1 Hen. Bl. 81.

(b) So a re-delivery to the plaintiff of his own property cannot be pleaded by way of accord and satisfaction. 1 Rol.

Ab. 128. Dyer, 355 b. 356 a. Yet there are cases where the voluntary performance of an act, which the plaintiff was compellable to do, is a good consideration; see Com. Dig. Action upon Assumpsit. B. 9.

JUDGE ELLIS being this vacation removed, Sir *William Scroggs*, one of the King's Serjeants, was sworn in his place the first day of this Mich. Term, and he took his place upon the Bench, Octob. 28, St. Simon and Jude.

## ( C. 219. )

Trespass for an assault on 1st May *anno regis* 28; plea, *son assault demesne* on 1st May *prædicto anno regis* 25: held, that the plea was good, for the time is not material, and *prædict'* cures the mistake in the year, and makes it surplusage.

ASSAULT and battery was brought for beating him the first of May *anno* 28 of the king.

The defendant justified *de son assault demesne* the first of May *prædict'* *anno* 25 *Regis*; and it being debated whether or no this plea was good, it was held by the Court to be good enough, either if it be considered, that in battery the time is not material, but the plaintiff may lay it at any time; and so, though the defendant justifies another day, it shall be intended the same battery (a);

Or else there being the word *prædict'* to the day and year of the king mistaken, it shall be surplus and void (b).

(a) Gro. Car. 514. Post, C. 257 b.

(b) 2 Cro. 429. Yelv. 94.

## [ 213 ]

## ( C. 220. )

When the gaoler suffers a prisoner in execution voluntarily to escape, the party at whose suit he was in custody may retake him. But where the party consents to the escape, he can never be retaken, although there was no intention to discharge the prisoner.

1 Roll 902.

10 Vin. 91.

THE question was no more, than whether, after the gaoler had suffered a person in execution voluntarily to escape, the party at whose suit he was in, might take him again? And the whole Court held it so clear that he might be taken again, that they would not suffer it to be argued, it being so often lately resolved (a); as in the case of *Crune* and *King* in this Court, where the Court was divided; and the case of *Vinter* and *Allen* (b), where judgment was given in this Court, and affirmed in a writ of error. 1 Rolle, 901, 902. 1 Leon. 313. And *North*, Chief Justice, said, since the law is so strict, that matters of deed shall not be discharged but by deed, he wondered that the law should admit an execution to be discharged by a mistake of the plaintiff's; as he cited a case where a creditor went over to the King's Bench to treat with a prisoner, and brought him but over the water to a tavern to treat, and it was held that he could never take him again; and so the law is clear, when he is once discharged by the consent of the plaintiff (c); but he could never see any reason why it should be in the gaoler's power to discharge the party so as the plaintiff shall never take him again.

(a) The party may have a new *ca. sa.* or a *scire facias*, or may bring debt upon the judgment; post, *Lenthal v. Lenthal*, p. 398. *Taylor v. Baker*, p. 453. 1 Vent. 4, 269. 1 Show. 177. 2 Lutw. 1264; or may have any kind of execution, 8 & 9 Will. 3, ch. 27, § 7. But the sheriff, who permitted the escape, cannot retake; *Barnes*, 373. 5 Term

Rep. 25; unless the prisoner be in execution upon conviction of a crime. *Butt v. Jones*, Gow's Ni. Pri. 99.

(b) S. C. Cart. 212. 2 Keb. 802. T. Jon. 21.

(c) See note to *Jones v. Pope*, 1 Saund. 35. 4 Burr. 2482. 6 Term Rep. 525. 7 Id. 420. 2 East, 243. 1 Barn. & Ald. 297.

## BASSETT v. SALTER.

S. C. 2 Mod. 136.

## OLDENBURGH'S CASE.

(C. 221.)

*Semb. B. C. Beaumont v. —, 2 Mod. 140.*

DEBT was brought upon a judgment in a court baron: the defendant offered to wage his law.

1. It was held clearly, that he might wage his law for such a debt, because it is not a court baron. [*quære, Court of record?*] 1 Brownl. 67.

2. It was held, that this recovery and judgment did make a debt, so that the wager of law must be upon a supposition of payment (b).

3. They held, that the Court in this case might, if they pleased, require special compurgators, it appearing that here was a debt, for the recovery makes it so; and the party refused to answer whether he had paid it or no.

And so it was said (by *Wirley*, prothonotary) the Court ordered it, where a man came to wage his law in an action of debt for a pain in a court baron, and the party refused to answer as to payment (c).

In debt upon a judgment in a court baron, the defendant may wage his law (a). And this wager of law is admitted upon the supposition that the money recovered has been paid. *Semb.* where a debt appears, and the defendant refuses to say whether he has paid it or not, the court may require special compurgators.

(a) Acc. 2 Ventr. 171. 1 Leon. 203-4. Co. Lit. 295 a. Co. Ent. 118. 12 Mod. 670. Hale's Pref. to Rolle's Abr. in 1 Coll. Jurid. 271. But see T. Raym. 386. *Mood (or Wood) v. Mayor of London*, 2 Salk. 683. S. C. 12 Mod. 682. 15 Viner, 58, 60.

(b) Acc. Co. Lit. 295 a. 2 Inst. 45. 3 Bl. Comm. 345. Styl. Rep. 199. Sty. Prac. Reg. 665, 4th ed. But in the case of *Wood v. Mayor of London*, cited in the last note, Chief J. Holt discusses the reason and origin of law-wager very much at large, and presents a view of that subject differing essentially in many respects from that which is given in the above authorities. He says that "although generally wager of law be looked upon as a privilege the defendant has, but originally it was not only a privilege of the defendant to discharge himself, but one which the plaintiff had, when he had no witness of his debt, to put the defendant under a necessity of giving him his oath to discharge him; so that it was a kind of equity in law, that the plaintiff might put him to take his oath that he owed nothing to him, or confess the debt, rather than the plaintiff should lose his debt, in cases where he had no witnesses of it at all, or had some who were then dead. Magna Charta, c. 28, makes this very manifest; the words are, *Nellus ballivus de castro ponat aliquem ad legem manifestam nec ad juramentum simplici loquela sua sine testibus fidelibus ad hoc inductis*; where note the words *de castro*, which shew that before that time the law was, that if a man had brought an action against another without any witness, he might put the defendant to

his oath whether he owed not the debt, and that was thought hard, and to prevent it this statute was made.—And upon bringing convenient proof by credible witnesses, and averring the statute of Magna Charta, a plaintiff may at this day compel a defendant to wage his law." 12 Mod. 678-9. 2 Salk. 683; and see 1 Reeve's Hist. Eng. Law, 248. Ld. Holt continues, "It is ridiculous to say that wager of law will lie in debt upon a judgment in a court baron, because the money might be paid in private; for that would be a reason to wage law in all the cases before put; but it is to be considered, that it is not the privacy of the payment or the possibility thereof, that is the occasion of a wager of law, but that the ground of the action is secret; as if debt be brought upon a bond with condition for the payment of money, the money may be paid privately, and thereby the bond is discharged, if payment could be proved; and yet in debt upon such bond wager of law will not lie, because the contract was by specialty. So it is plain the possibility of private payment will not entitle one to a wager of law." 12 Mod. 681-2. Law-wager has been compared to the practice, which obtains in courts governed by the civil and canon law, of supplying the defective proof of one party by demanding an oath from the other; and this resemblance is strengthened by the passages above cited. See 3 Bl. Com. 342, 446. Wood's Civil Law, 369, edit. 1712. Domat's Civil Law, P. 1, B. 3, tit. 6, s. 6. Ersk. Law of Scotland, B. 4, tit. 2, § 3.

(c) It appears to be the usage, in cases of law-wager, for the court to examine

*Assumpsit* upon a special promise to pay rent lies not in an inferior court (d).

A *quantum meruit* for work done out of the jurisdiction of an inferior court will not lie, although the promise be within it. *Ante*, p. 104, note (a).

*Semb.* where a man gives jewels to a woman during courtship and in contemplation of marriage, if the match is broken off, he is entitled to restitution. Co. Lit. 204 a.

4. It was held, an *assumpsit* for rent, though there were a special promise, ought not to be brought for rent in an inferior court, because it concerns the realty.

As a *quantum meruit* for work done in London will not lie in an inferior court, though the promise were made within the jurisdiction, for the jury must inquire of the worth.

And *North* cited a case in the King's Bench, where a man courted a lady, and had presented her with several jewels, and after, the match breaking off, he brought a *detinue* for the jewels, and she offered to wage her law; and the Court did admonish her, that, if she had not restored them, she ought not to wage her law; for she ought to restore them, though it were on the man's side, because it was *causa matrimonii prælocuti* (e). And in this cause the parties by consent proceeded to issue.

the defendant personally, and to question him respecting the debt, before he is admitted to take the oath. See 2 Leon. 110. 3 Leon. 212, 258. Sir T. Ray. 386. 2 Lilly Prac. Reg. 825, H. 2d ed. 1 Richardson's Practice, K.B. 547. In *Slade's* case, 4 Co. 95, it is said, that "the judges without good admonition and due examination of the party, do not admit him to it:" and in the case of the *City of London v. Wood, Ward*, C. B. is represented to have said that "the judges are to use a sort of discretion in admitting people to wage law." 12 Mod. 676. But according to Lord Holt, in an anonymous report, 2 Salk. 682, they can only admonish the defendant, and "if he will stand by his law, they cannot hinder him, seeing it is a method the law allows." With regard to the compurgators, the number of them is by no means clearly settled, and in a late case the court, being moved to assign the requisite number to the defendant, refused to give any assistance. *King v. Williams*,

2 Barn. & Cressw. p. 538. According to Lord Holt, the course of the Common Pleas is to have six. *London v. Vanacker*, 1 Lord Ray. 500. S. C. 12 Mod. 272. And by consent of the plaintiff they may be altogether dispensed with. 2 Keble, 360. 1 Vent. 4. A defendant, who bars the plaintiff by waging his law, does not seem to be within any of the statutes which give costs to the defendant upon nonsuit, verdict, demurrer, &c.

(d) Whether *assumpsit* on a promise to pay rent lay at common law, see 1 Lev. 179, 204. 3 Lev. 150. 3 Mod. 73. Skin. 238, 242. 2 Show. 135.

(e) "The property was not changed by the gift, being to a special intent." S. C. 2 Mod. 141. The same point occurs in *Young v. Burrell*, Cary's Rep. p. 77, cited, 14 Viner, 19. Acc. Com. Dig. Action upon Trover, D. A similar condition was tacitly annexed by the Roman law to a *Donatio ante nuptias*. Inst. l. 2, tit. 7, § 3. Cod. l. 5, tit. 3. Wood's Civil Law, p. 138, edit. 1712.

## ( C. 222. )

## STYLEMAN v. PATRICK.

S. C. 2 Mod. 141.

An action on the Case is not within the stat. 22 & 28 Car. 2, c. 9, which limits the costs when the plaintiff recovers less than 40s. damages. *Post*, p. 226, 366, 394. 1 Salk. 208. 3 Wils. 319. Bull. N. P. 329. 6 Term Rep. 129, 130.

A COMMONER brought an action of the case against one that trespassed upon the place where he had common; and the jury gave him 10s. damages, and 40s. costs.

And it was moved by Serjeant *Barton*, upon the new act of parliament, that he might have no more costs than damages.

And *North*, Ch. J. said, this statute was made with respect to the statute of 43 Eliz. 6, for there it is provided, that in personal actions, if the debt or damage is under 40s. &c. the Judges may mark the *postea*, and the plaintiff shall recover no more costs than damages; but there trespass and battery are excepted; and then this statute provides in those cases

only; the difference is, upon the statute of 43 Eliz. the party shall have his ordinary costs, unless the Judge certify; but upon this last statute in trespass and battery, when less than 40s. is given, the party shall not have ordinary costs, unless the Judge do certify.

And he said it was held by the Judges, that such personal actions, which did not bring the title of the land in question, were not within this statute, except battery; and therefore he held, this, being an action upon the case by a commoner, could not possibly bring the title of the land in question; and besides, the statute was made to prevent \*suits [ \* 215 ] for petty trespasses; but this might be a great trespass, although one commoner might be damnified no more than 10s. and so he conceived it was not within the statute; and so did *Windham* and *Scroggs*.

But *Atkins* held, that this was within the statute; for although the title of the land could not come in question, yet common is concerning land, and a man may have freehold in it.

And *per North*,—Here it appears his title was in question; for he must prove his title in evidence, as it is alleged in the declaration. And they all agreed, that where it appears by the record that a title is in question, there is no need of the certificate of the Judge.

But *per Atkins*,—It may be the defendant would confess his title upon the trial, and then it would not be in question.

But, according to the opinion of the other three, the plaintiff had his ordinary costs.

Then it was moved by *Barton* in arrest of judgment, that he had not sufficiently averred his right of common, because it was only alleged, that whereas J. S. was seised of the land, *cumque etiam* the plaintiff had right of common, and this was no positive affirmation.

But *per Curiam*,—It is well enough: and they took this difference, that where an action is brought for a bare trespass, there to allege the trespass with *quod cum* is held not good, because all the precedents are contrary, for they do expressly say, "that they did trespass;" but in an action of the case it is well enough, and all other actions; and here the right of common is but inducement as it were to the action, though it must be proved too. [Style, 353, 450.]

And *North* said, he would fain have holpen it in trespass, but that all the precedents are contrary. *Et issint fuit tenus in Term. Pasch. 1679.*

Where it appears of record that the title is in question, no certificate is necessary under the stat. 22 & 23 Car. 2, c. 9. Acc. 2 Lev. 234. 3 Barn. & Ald. 443.

A *quod cum* is good in Case, but bad in Trespass. 4 Bac. Ab. 22, 5th edit. 1 Stra. 621. 2 Stra. 1151, 1162. 1 Wils. 99. 2 Wils. 203.

### READ v. DAWSON.

( C. 223. )

*Semb. S. C. but not S. P. 2 Mod. 139.*

DEBT upon an obligation against an executor, who pleads a recovery in debt and judgment, and that he had not assets *ultra*, &c. After a verdict, it was moved that this was no

To debt on an obligation against an executor, the de-



defendant pleads  
a recovery in  
debt and no

[ \*216 ]  
assets *ultra*, &c.  
without stating  
whether the  
debt recovered  
-was a specialty  
or a simple con-  
tract: the plea  
held bad on de-  
murrer, but  
perhaps aided  
by verdict.

good plea, because for all that appears this recovery might be upon a debt for a simple contract; for a plea shall always be presumed strongest against him that pleads it. Plow. 46. 1 Inst. 102. 3 H. 7, 2. [Vaugh. 94.] And then \* though a verdict be for the defendant, yet he ought not to have judgment; and cited *Nicholls's case*, 5 Co. Moor, 867. Hob. 112.

But the Court seemed to incline, that it was well enough after a verdict, though perhaps upon a demurrer it might have been bad, according to 8 Co. 133, *Turner's case*; for that case was not after a verdict, but upon a demurrer; though it was alleged by *Goodfellow* to be after a verdict. *Cur' advisare vult* (a).

(a) The recovery here pleaded was of course against the executor himself, and he ought to have shewn either that it was grounded on a specialty, or that it

was had before notice of the outstanding bond debt. 3 Lev. 115. 3 Mod. 115. *Sawyer v. Mercer*, 1 Term Rep. 690. *Hickey v. Hayter*, 6 Term Rep. 388.

( C. 224. )

SOUTHCOTT v. STOWELL.

S. C. 1 Mod. 226, 237. 2 Mod. 207. 3 Kebl. 704.

See the margin,  
p. 225.

IN a special verdict the case was: Tho. Southcott, having issue Sir Popham and William, upon the marriage of the said Sir Popham covenants to stand seised to the use of Sir Popham and the heirs male of his body, remainder to the heirs male of himself, remainder to his own right heirs.

Sir Popham has issue Edward and five daughters, and enters and dies; then Edward enters; then Thomas the father dies; then Edward dies without issue.

The question was, who should have the land by virtue of this limitation, whether William the youngest son of Thomas, or the daughters of Popham who were heirs general to Thomas? And here were two points:

1. Whether this was a good limitation to his own heirs male, or whether it was void, according to 1 Inst. 22? because he had not parted with the whole fee out of him; and then by 1 Inst. 22 b, the limitation is void; for although a man may upon a feoffment, &c. raise an use to his heirs male, so as to make his heir a purchaser, yet this being upon a covenant to stand seised, the fee remains always in the feoffor, when he limits the remainder to his own right heirs, this is the old reversion in him: and *Windham* seemed to incline, that although a gift to a man's own heirs male, at common law, might be void, yet by way of use it might be well enough; and so this differs from the case in Dy. 156.

2. Admitting that this were a good limitation of an estate-tail to his own heirs male, whether William, the uncle of Edward, should take, or the sisters of Edward, upon a supposition that the tail was spent, and then they were heirs to Thomas?

[ \*217 ] \* And for this point the Court seemed clear, that when Thomas died, Edward his grandson was in, and this estate tail, which was limited to the heirs male of the grandfather,

Dy. 156. *Post*,  
Case 476 b.

*Post*, p. 225.



In him, because he was heir male to his grandfather; and then when he dies, William doth claim to be in by descent *per formam doni*; and so although he be not complete heir to the grandfather, yet he is such an heir male as shall take by descent; for the descent is governed wholly by the statute *De donis*. 1 Inst. 24 b.

But they agreed, that he could not have taken this estate tail by purchase, because there such an heir ought to be a complete heir, according to the difference, 1 Inst. 24 b. Post, p. 225, note, *ibid*.

*North*, Ch. J. held, that this estate tail was in contingency till the death of Thomas; for if Edward had died without issue male in the life of Thomas, then there had been no heir male of Thomas to have taken, and then that limitation had been void, because the remainder could not have vested upon the determination of the precedent estate. *Sed quære de ceo, car semble a moy*, that upon this limitation an estate for life by implication results to Thomas, and then if Thomas had survived Edward, he might have been seised in tail, with remainder to his right heirs. *Sed adjournatur. Vide le case de Pybus and Mitford, postea*, p. 351. [Continued, *post*, p. 225.] Post, p. 225, note, *ibid*.

### LORD TOWNSEND v. DR. HUGHES, *Chancellor of Norwich*. ( C. 225. )

S. C. 1 Mod. 232. 2 Mod. 150, very fully reported.

SCANDALUM MAGNATUM for these words: "The Lord Townsend is an unworthy man, and acts contrary to law and reason." Upon not guilty pleaded a trial was had in Norfolk, and 4000*l*. damages given to the plaintiff. See the margin, *post*, p. 222.

It was moved in arrest of judgment, that these are no such words as are within the statute to raise discord between the king and his people; for to say "He is an unworthy man," being spoken in general, imports no particular scandal, for in some sense, as upon a religious account, every man may be said unworthy; but if he had said "an unworthy lord," that had implied, that he had been unworthy of that honour which the king had thought fit to confer upon him.

And for the other words, "that he acts contrary to law and reason," it is not scandalous; for every man daily breaks the penal laws; and to act against reason is no more than to act against law, which is *summa ratio*.

And they cited 2 Cro. 196, where for worse words the Court was divided, whether the action lay or not; and a \*case was cited, which was Trin. 1656. Rot. 254, betwixt *Maudit* and The Earl of *Leicester*, where the words were, "He is a wicked man, a cruel oppressor, and an enemy to the reformation;" and in that case it was held the action would lie, because there was a great scandal to be a common oppressor, &c. [ \* 218 ]

And the Duke of *Buckingham's* case was cited, where the words were, "You are used to do things against the law,

and pound men's cattle, so that they cannot be replevied; and held actionable.

(1) *Ante*, C. 58.  
1 Lev. 148.

And the Marquess of *Dorchester's* case was cited (1), which was, "My Lord Marquess is to be valued no more than that dog." And *North*, Ch. J. moved to arrest judgment in the King's Bench, and laboured in it all that ever he could, and yet they would not arrest judgment.

*Vid. post*, p.  
221-2.

And they all wondered how an action came at first to be brought upon this statute to recover damages to the party, when the penalty prescribed in the act is by fine and imprisonment; and though it be brought with a *tam quam*, yet the king hath nothing by it; but they said, it is too late in the day now to make it a question, whether the action would lie or not; but *Atkins* said, the first precedent that he could find was in the time of H. 7, in *Keilway*. *Adjournatur. Postea*, Case 227. [p. 220.]

(C. 226.)

FLOYD v. LANGFIELD.

*S. C. Lloyd v. Langford*, 2 Mod. 174.

When a termor assigns his whole term, rendering rent, he may maintain debt for the rent, but cannot distrain. There may be an executor *de son tort* of a term (*vid. post*, p. 261-2.); unless it be merged in the reversion by surrender.

AN action of debt for rent was brought against the defendant as executrix of A. The case upon a special verdict was, that A. being seised in fee of certain lands, leased them to B. for ninety-nine years in consideration of 300*l.* and B. redemises the whole term to A. rendering 20*l.* rent *per annum*; [the intent of the bargain being to secure an annuity of 20*l.* to B. which he purchased with the 300*l.*] then A. dies, and the defendant entered upon those redemised lands as guardian to her son.

(1) *S. C. Bro. Dette*, pl. 39.

In this case it was agreed, 1. That when a termor assigns his whole term, rendering rent, although he cannot distrain, because he hath no reversion in him, yet he may maintain an action of debt against the lessee upon this contract. 2 Cro. 487. 45 Ed. 3, 8(1). Moor, 126 (a).

(a) Upon the assignment of a lease for years, debt lies for such a rent, although it was not reserved by deed. *Wilston v. Pilkney*, 1 Ventr. 242. *Cartwright v. Pingree*, *post*, p. 398. *Brownlow v. Hewley*, 1 Ld. Ray. 82. But where a tenant for life assigns or surrenders, the reservation must be by deed in respect of the freehold. *S. C.* 1 Ventr. 243. *Gilb. on Rents*, p. 29. *Shep. Touchst.* 307. With regard to the remedy by distress, it is obvious that a reservation made upon a conveyance of the grantor's whole estate, is not a *rent service*, because there is no reversion or tenure left to support the relation of lord and tenant between the parties. *Litt.* § 215-6. 2 Roll. Ab. 448-9. *Style's Prac. Reg.* p. 61, 4th ed. *Watkins' Convey.* p. 103-4, 4th edit. *Bac. Ab. Rent*, (C). But where the assignment is by indenture to which the assignee is a party, the reservation might

be held to operate as a grant of a *rent seck*, which would be therefore recoverable by distress, under the stat. 4 Geo. 2, c. 28. *Litt.* § 217. *Harg. Co. Lit.* 148 b. n. (5). 12 Hen. 4, 17. *Bro. Reservation*, pl. 8. *Perkins*, § 687-8. It is true that in ——— v. *Cooper*, 3 Wils. 375, it was determined that no distress lies for rent reserved upon an assignment of a term of years; and this case is supported by *Smith v. Mopleback*, 1 Term Rep. 441. *Parmenter v. Webber*, 8 Taunt. 593. *S. C.* 2 B. Moo. 656: but it must be remarked, *firstly*, that in the two latter cases (and probably in *Cooper's* case also), the party distraining avowed shortly as for rent service in the form prescribed by stat. 11 Geo. 2, c. 19, and was therefore precluded from insisting that the reservation took effect as a *rent seck* or *rent charge*. See *Bulpit v. Clarke*, 1 New Rep. 56. *Secondly*, that the con-

2. It was agreed, that there may be an executor *de son tort* of a term, and he shall be liable to the payment of the rent; as it was held in the case of *Porter and Swetney* (2), B. R. Trin. 1653. (2) S. C. Styl. 406.

3. In this case here can be no executor *de son tort* of the term, because it is merged in the reversion, and is become one intire estate with that; and so, when the defendant \* entered as guardian to her son, she could not be an executor *de son tort*, because the term was not in being. [ \* 219 ]

veyance in *Cooper's* case does not appear to have been by deed indented, and in the two other cases it appears to have been without deed. It is further observable, that the Court in *Cooper's* case is reported to have affirmed that "there is no such thing as a rent service, rent seck, or rent charge, issuing out of a term of years." So Lord C. B. Gilbert, (commenting upon *Bland v. Inman*, Cro. Car. 288, in his Treatise on Rents, p. 57), seems to think that no rent seck can issue out of a term of years. And Mr. Chambers, in his Law of Landlord and Tenant, says, that "it does not appear that a rent *de novo* could ever have been reserved as rent seck, out of any less estate than an estate in fee simple," p. 598. Yet it is submitted that these several propositions are not correct, and that a rent charge or rent seck, i. e. a

rent either with or without a clause of distress, may well be made to issue out of an estate for years. See Co. Litt. 147 b. Plowd. 524 b. 3 Bulstr. 121-2-3, 125. Hutton, 114. *Mounson v. Redshaw*, 1 Saund. 187. *Newcomb v. Harvey*, Carth. 161-2. *Goodwin v. Parker*, ante, p. 1. On the subject of rents reserved on assignments or surrenders, see the following additional authorities, *Warner v. Agus*, Godb. 146. Noy, 109. *Cartwright v. Pinkney*, 1 Vent. 272. S. C. post, p. 398. *Trevil v. Ingram*, 2 Mod. 282. *Henn v. Hanson*, 1 Lev. 100. *Spatchurst v. Minns*, Aleyn, 57-8. *Bland v. Inman*, Cro. Car. 288. *Poultney v. Holmes*, 1 Stra. 405. *Palmer v. Edwards*, Dougl. 186. 19 Viner, 112, 115. Gilbert's Treatise on Debt, p. 385-6. On the difference between rents and sums in gross, see 18 Viner, 490.

ELLIS v. YARBOROUGH, the Sheriff of Yorkshire.

(C.226b.)

S. C. 1 Mod. 227. 2 Mod. 177.

THE defendant pleads the statute of 23 H. 6. That he let him to bail, and took sufficient sureties of two sufficient men, having sufficient within the county.

The plaintiff replies, *absque hoc*, that he did not take sufficient sureties, having sufficient within the county. The defendant demurred. In this case it was held,

1. That since the statute of 23 H. 6, if the sheriff took sufficient sureties, he was not chargeable in an action for an escape; because by that statute he is compellable to take bail, and if he refuses, an action lieth against him, if the bail tendered were sufficient. [Ante, p. 210.] But yet the Court said, that had been made a great question, because by the statute he is to return a *Cepi corpus, quod paratum habeo*; and they said it was a case yet depending between *Page and Turlses* (1), in this Court, which was not yet resolved; and the authorities cited for that were Cro. Eliz. 460, 852. Noy, 39. 2 Cro. 419, 580.

No action lies against the sheriff for taking insufficient bail, but he shall be amerced, till he brings in the body. Acc. *Posterns v. Hanson*, 2 Saund. 59, and note (6), *ibid.* Cont. 1 Salk. 99. *Vid.* Hutton, 120.

(1) *Ante*, Case 215, p. 209. *Post*, p. 225.

2. It was argued, that if the sheriff took insufficient bail, he should not be chargeable in an action for an escape; because he is to be judge, and take what bail he pleaseth; and if the bail be insufficient, it is at his peril, for the Court will amerce him till he bring in the body; and for that they cited 2 Cro. 286. Cro. Eliz. 808.

But in this point the Court were divided; for *Atkins* thought no action would lie against him, though the bail were insufficient; but he was to be punished by amerciaments.

*Windham* thought, if any action did lie, it ought not to be a general action for an escape, but a special action; as it is, if the pledges be insufficient, in a replevin.

But *North* and *Scroggs* were of opinion that this action would lie well enough, and that the party had an interest in the body when it was arrested; and they said, this would be to run to another extreme from the case of *Page* and *Turlses*; for there it was doubted whether escape would not lie, though he took sufficient bail; and here it would be hard to hold that it should not lie, if the bail were insufficient. *Et adjournatur*.

But afterwards it was adjudged *per tot' Curiam*, that the action would not lie for the party, but the sheriff is to be amerced till he bring in the body; and he is judge of the bail, but the party hath no remedy by action.

[ 220 ]

## DE TERM. S. HILARII, 1676.

IN COMMUNI BANCO.

( C. 227. )

LORD TOWNSEND v. DR. HUGHES.

Continued from p. 218.

SCANDALUM MAGNATUM. Serjeant *Maynard pro def'* argued, that these words, that "He is an unworthy man," are too general; and where general words do relate to such particulars that are not actionable, there the general words shall not be actionable; as if a lord invites a man to dinner, and beats him with the spit, he does unworthily, and yet these words surely would not be actionable, if one had said so of a lord.

Besides, it cannot be denied but a man may justify in an action upon this statute, and here the words are so general in their signification, that it would be impossible to make a justification.

And to say "He acts contrary to law," is no more than every man doth, if he doth but transgress against a penal law; and if a judge gives judgment mistaking the law, he acts contrary to law, and yet to say so of a judge would not be actionable.

*Pemberton pro quer'*.—The state of the kingdom, at the time of the making of this statute, being considered, will tend much to the understanding the meaning of it.

[ \* 221 ] And for that we must know, that the state of the kingdom at that time was military; their tenures, yea their very recreations were military, and the sword was the \*usual means of attaining titles and dignities; and then the use was, that

if any of the great men received a provocation, they presently betook themselves to their swords for their vindication; and that was the reason of making this and other statutes against riots and liveries, &c.

And therefore it is sufficient upon this statute, that the words be such as in probability are provoking, though they be such as in the case of a common person would not be actionable; and therefore in the Lord *Winchester's* case, 3 Leon. 376. "He imprisoned me till I gave a release," are actionable; and he cited 12 Co. Lord *Northampton's* case, Lord *Shrewsbury's* case, &c. 2 Cro. 196. And to that which hath been said, that it was wondered that actions were at first permitted upon this statute, he said, that wheresoever a statute prohibits an evil, he that is damnified by the doing of that may have his action. And he admitted, that words upon this statute may be extenuated in their meanings by the circumstances, as in Lord *Cromwell's* case; and that the party may justify as to an action upon this statute, although perhaps that will not excuse him as a publisher of news, &c. for the words ought to be false that are actionable here. *Curia advisare vult.* [Continued next page.]

Ante, p. 218

Post, p. 222.

Vid. post, p. 223.

## INFORMATION AGAINST SIR WILLIAM TURNER.

( C. 228. )

S. C. 2 Mod. 144.

It being moved by Serjeant *Baldwin*, that they might amend their information, (which was for not executing the act against conventicles) and leave out *Mansionali*, and let it be *Domo* only; the Court said, they did not know that there had been any amendments in the case of informations upon penal laws; and that informations upon penal statutes were excepted in the statutes of *Jeofails*; but in informations at common law the Court may grant an amendment. And *North*, Ch. J. said, there could be no amendment of an indictment, because that was found by twelve men upon their oaths (a).

Information at common law may be amended by the court. *Quere*, as to informations on penal statutes? Indictments are not amendable.

(a) Vid. Bac. Ab. Amendment, (C). *Wilkes*, 4 Burr. 2570. *R. v. Holland*, 4 Bondfield v. *Milner*, 2 Burr. 1098. *R. v. T. R.* 457. *Atcheson v. Everitt*, Cowp. 392.

Semb. S. C. *Sherrard v. Smith*, 2 Mod. 103.

C. 228 b.)

TRESPASS. The defendant justifies by a distress for rent and services.

The plaintiff replies *Hors de son fee*. Defendant demurs.

Obj. That a man cannot plead *Hors de son fee*, without taking the tenancy upon him. 1 Inst. 1 b.

\* Ans. That is meant in cases of assise and replevin, where the title is in question; but this being but an action of trespass, the possession is sufficient to maintain the action against any man that hath not a better title (a). And *per Cur'*, it is not necessary in this action to take the tenancy upon him. And *per Atkins*—All the cases in Bro. Abr. Tit. *Hors de son fee*, are in assises, &c. *Jud' pro quer' nisi*.

In trespass the defendant justifies under a distress for rent and services: the plaintiff may re-

[ \* 222 ]  
ply *hors de son fee*, without taking the tenancy upon him. Doctr. Plac. 216. Viner Ab. *Hors de son fee*.

(a) *Serle v. Bunnion*, ante, p. 206.

( C. 229. )

## LORD TOWNSEND v. DR. HUGHES.

Continued from p. 221.

To say of a peer, "that he is an unworthy man, and acts contrary to law and reason," is *Scandalum magnatum*. Buller Ni. Pri. p. 4.

Words spoken of a peer are actionable, although they charge no particular crime. 2 Sid. 21, 30.

Now the Court gave judgment in this case, viz. *North, Wyndham and Scroggs*, that the plaintiff ought to have his judgment. *Atkins pro def*."

*Scroggs (a)*.—Words ought to be taken in a common and natural sense, and are neither to be strained by way of aggravation nor mitigation (*b*). He said, if a man had said, "He had been a weak lord, and had acted, &c." that had not been actionable, because that had only implied a defect in the understanding; but to say "He is unworthy" implies a moral miscarriage, and an error of the will.

Although these words are general, and charge him with no particular crime, yet they are actionable; and although it be no good return in a bishop for refusing a parson, to say that "He is *criminosum*," yet it is a slander of a nobleman to say of him so in general; and he cited the case of the Lord of *Leicester*, "He is an oppressor, and an enemy to the Reformation."

*Atkins pro def* (*c*).—1. We must consider the occasion of this law, and that we find in Sir Robert Cotton, 173, that men were like dogs devouring raw flesh, i. e. they were ready to devour and destroy one another.

2. What it did intend to provide against, and that was great dangers that were like to come unto the realm.

3. The punishment.

5 Co. 125. 9 Co. 59. 12 Co. 37. Barrington's Observ. on stat. p. 314, n. (u), 5th edit.

We must likewise consider, that there is nothing made an offence by this act, that was not so at the common law; but being prohibited by this act the crime is aggravated; as the king's proclamation doth not make any thing an offence that is not so before, but it adds an aggravation to the doing of it afterwards.

2 Inst. 55, 74. The statutes of Scan. Mag. do

[ \* 223 ] not expressly give an action, but the party has it by operation of law.

Although the act doth not say that the party shall have an action, yet he hath that by operation of law; for wheresoever a statute doth prohibit a thing, and a particular person afterwards is damnified by the doing of it, he shall \* have his action upon the statute for it by construction of law. 10 Co. 75. 12 Co. 135 (*d*).

All words that are actionable at common law are not upon this statute; for it appears by the statute that they ought to be terrible words; but no words are actionable upon this statute that are not so at the common law.

These words are too general, and the law doth not give actions for such general words. 1 Roll. 57, 43. Cro. Car. 110. And most of the cases have had in them somewhat of a particular accusation. 1 Sheph. Abr. 28. Words that may equal-

(a) See his argument in 2 Mod. 159.

(b) *Ante*, p. 15, note (c). 9 East, 96, and 3 Wooddes. Lect. 173.

(c) See his argument in 1 Mod. 238. 2 Mod. 161.

(d) Acc. 2 Ld. Ray. 954. So an action lies for a forcible entry by the stat. 5 Rich. 2, although no action is expressly given by that statute. Booth on Real Actions, p. 258.



ly be inclined to a more severe or a more mild sense shall be always taken in the most mild sense; but he agreed with *Scroggs*, that they shall not be strained neither to the one nor the other.

In this case we have no contemporaneous exposition, which always gives the best light into the meaning of a statute; because many times those very judges are in parliament when the law was made; but here we find no judgment till 120 years after the making of the statute; the first is 13 H. 7. *Keilway*, 26 (1); the next is 4 H. 8. *Crompt. Jurisd.* 13. Cro. (1) *S. C. Dyer*, 285 a. *Eliz. Bishop of Norwich's case*, and the Lord *Mordant's case* in the same book; and 2 Cro. 196; where we find the judges divided: but in all the cases that are extant we find no judgment arrested, and therefore it is time to set some bounds to them; for surely every unmannerly word is not actionable, though it be spoken to a lord.

*North* and *Wyndham* argued with *Scroggs*, that the plaintiff ought to have his judgment. And *North* denied that a man might justify upon this statute; but he agreed a man might explain himself, as in the Lord *Cromwell's case*, 4 Co. but the action being *Tam quam* he could not justify; and so he said it had been held in the Star-chamber (e).

And he said some words that do scandal a man in his office or profession are actionable, though they be not spoken with relation to his profession; as to say of a lawyer, "He is a fool, or an ignoramus;" and so of a tradesman, that "He is a bankrupt;" and there needs no discourse of his profession or trade to make the action maintainable, because the words do apply themselves, and do import an incapacity for his trade or profession. And these words, to say, "He is an unworthy man, &c." do imply his unfitness for any of those great offices that possibly he may be capable of.

(e) Acc. Bac. Ab. Scan. Mag. C. But of reproach, however general, might be see *cont. Com. Dig. Pleader*, 2. L. 3. justified by shewing special matter. 2 Buller's Ni. Pr. p. 8. And *Scroggs*, J. Mod. 160. 3 Wooddes. Lect. p. 181. in the principal case, thought that words

In an action of Scan. Mag. the defendant cannot justify, but he may explain. 2 Mod. 166. Per *North*, C. J.

2 Mod. 165-6. 2 Ld. Ray. 1480. 1 Lev. 280. 2 Lev. 62. *Sed vid.* 1 Lev. 250. 2 Sal. 694-6. 2 H. Bl. 531. 2 Saund. 307.

[ 224 ]  
( C. 230. )

*Semb.* S. C. 1 Mod. 235, and *Jones's case*, 2 Mod. 198.

It was said by *North*, that the Court of Common Pleas may grant a *Habeas Corpus ad respondendum*, or *ad faciendum et recipiendum*, for that relates to civil matters; but they could not *ad subjiciendum*, for that concerns criminal matters; and the party cannot subject himself to this Court for his trial, where he hath not jurisdiction of the matter; and if a *habeas corpus ad faciendum* be granted, and if it appears that the party is committed for a criminal matter, they may send him to a proper Court to be tried, but they cannot try him themselves. But by the statute of 16 Car. where a man is committed by the council, &c. this Court by that act ought to grant a *habeas corpus*, *come semble* (a).

(a) *Ants*, p. 5. *Post*, p. 253. T. Jo. 13-4. *Vaugh.* 154. *Carter*, 291. That a *hab. corp. ad subj.* and discharge the party from an illegal imprisonment at the court of Common Pleas can award common law, see *Wood's case*, 2 Will.

On the authority of the Common Pleas to grant a *hab. corp. ad subjiciendum*. *Post*, Case 269, S. P. 2 Inst. 53, 55. 4 Inst. 71. 2 Hale P. C. 144. 14 Vin. 212.

Black. 745. S. C. 3 Wils. 172. 3 Bl. Com. 131. And it seems that the court of Exchequer has the same power, although not mentioned in the statute 16 Car. 1, c. 10. 3 Bl. Com. 131, and 1 vol.

of Hargr. Jurid. Arguments, p. 17, 18. That the Ld. Chancellor may issue the writ at common law in vacation; see *Crowley's case*, 2 Swanst. Rep. p. 1, overruling *Jenks's case*. 3 Bl. Com. 132.

## DE TERM. PASCHÆ, 1677.

IN COMMUNI BANCO.

( C. 231. )

SMITH v. SYKES.

No action lies for beating the plaintiff's wife, so that she died.

It was held, that if A. beat the wife of B., so that she dies, B. can have no action of the case for that; because it is criminal, and of a higher nature (a).

[ \* 225 ]

1 Salk. 119. 2 Stra. 977. C.T.Hard. 54-6.

And it was urged by Serjeant *Bartell*, that if a man beat a feme covert, the husband could have no action *per quod consortium amisit*, but the husband and wife ought to \*join in the action, and if the husband dies it shall survive to the wife; but the action shall not survive to the husband, if the wife dies; and he cited 37 H. 6, 7. 2 Roll. 568. *Curia advisare vult*.

*Mes semble a moy, q' le action per quod consortium amisit gist bien, per 2 Roll. 556. 2 Roll. Rep. 51.*

(a) i. e. if she dies within a year. 2 Roll. Ab. 557, l. 5, or the battery was felonious, *Crosby v. Leng*, 12 East, 409. But *quære*, if an action will not lie after the defendant has been criminally prosecuted? See the last case. And see

further, 1 Lev. 247. Yelv. 89, 90. Com. Dig. Action upon the Case, B. 5. *Ibid.* Trespass, D. Buller's Ni. Pri. 32, 78. 1 Mod. 283. 3 Wooddes. Lectures, p. 201.

( C. 232. )

SOUTHCOTT v. STOWELL.

Continued from p. 217.

A. having two sons, B. & C., covenanted to stand seised to the use of B. the elder in tail male, remainder to the heirs male of himself (a), remainder to his own right heirs. B. died, leaving one son and several daughters: then A. died, and afterwards the grandson died, without issue. Held, that C. was entitled to the estate tail limited to the heirs

Now, the case being argued again, the Court gave judgment for William, the plaintiff.

1. And for the first point they all held, that this limitation to the heirs male was good enough; though they did not positively resolve whether it should be an estate in contingency, or whether an estate for life should be raised by implication to Thomas, the covenantor; there being no occasion for that point in this case, by reason that Edward survived his grandfather, who was heir and heir male, and so took the estate either one way or the other; but if the grandfather had survived Edward, then, if the remainder had been contingent, it had been destroyed, because there was no person capable to take at the determination of the former estate; and besides, William not being heir, by reason of the sisters of Edward, could not have taken by purchase, though, the estate vesting in Edward, he now may take by

(a) The remainder was to the heirs male of his own body, according to 1 Mod. 226, and 3 Kebl. 704.

descent; and they gave judgment *undā voce* for the plaintiff (b).

And though a man could not limit an estate to his heirs by conveyance at common law, yet it might be done well enough by way of use (c).

(b) The better opinion seems to be, that an estate for life resulted to the covenantor, and that William might have taken as special heir by purchase, although he was not the heir general. See *Wills v. Palmer*, 5 Burr. 2615. S. C. 2 W. Bl. 687. Fearn. Cont. Rem. 44—49, 7th edit. *Ibid.* 212, and *Goodtitle d. Weston v. Burtenshaw*, reported in the Appendix to Fearn. *Penhay v. Hurrell*, 2 Freem. 231, 235, 258. *Cholmondeley*

v. *Clinton*, 2 Jac. & Walk. 107. And see Harg. Co. Lit. 24 b. note (3). 164 a. note (2). 1 Fonbl. Equity, 429 n. 5th edit. On the nature of a descent *per formam doni*, see *Mandeville's case*, Co. Lit. 26 b. Fearn. Cont. Rem. p. 80. 4 Cruise's Dig. 344, 2d edit.

(c) 1 Mod. 238. *Ante*, p. 216. *Post*, p. 354, 372. 2 W. Black. 687. Sugd. Gilb. Uses, 150-1.

male of the covenantor, and that he took it by descent *per formam doni*, from the grandson. Wilmot's notes, 272.

PAGE v. TURLST.

Continued from p. 210.

( C. 233. )

THIS Term this case being argued again by—for the defendant, who cited and relied upon Cro. Eliz. 852. Noy, 39. 1 Roll. 92, 93. 2 Cro. 286.

*Coniers*, for the plaintiff, took a difference between an action for an escape and for a false return, and cited Dy. 25. 2 Cro. 283. Cro. Eliz. 415, 791. Latch, 187.

The Court all, except *Scroggs*, gave judgment for the defendant, and held that no action would lie against the sheriff in this case, but that the sheriff may return *paratum habeo*, though he hath not the body in Court at the day; \*but if, upon a *habeas corpus*, directed to him, he doth not bring in the body, the Court will amerce him till he doth; and they relied upon the case of *Boles* and *Lassell*, chiefly, Cro. Eliz. 852.

[ \* 226 ]

And the prothonotaries said, that the course is to amerce the sheriff the first day of the return, if he hath not the body there; and the party hath no other remedy, but must rely upon the justice of the Court to punish the sheriff till he bring in the body.

And *North* said it would be very inconvenient if this action should lie, for then, upon the sheriff's return, if the body were not presently at Westminster at the day, the party might have his action for a false return; and it would be a great oppression to force the sheriffs all over England to bring in their bodies upon every arrest.

But *Scroggs* said, that because it had been lately adjudged here betwixt *Ellis* and *Yarborough* (1), that an action would not lie against a sheriff for taking insufficient bail; therefore he thought it ought to lie, if the sheriff did not bring in the body, or else the party should be without remedy.

(1) *Ante*, p. 219.

But the rest of the Judges answered, that it is to be presumed, that the sheriff will do justice; and amerce him till he bring in the body; and so judgment was given for the defendant.

## (C. 233 b.)

When the plaintiff brings an action of trespass for mesne profits by way of action on the Case with a *per quod*, and the damages are under 40s. he shall have no more costs than damages. *Vide* 1 Str. 645. 6 Term Rep. 593. *Ante*, p. 214.

THE question was, whether or no an action of trespass for mean profits being brought by way of Action on the Case, the plaintiff should have any more costs than damages, the damages being under 40s. by virtue of the new act of parliament.

*Per totam Curiam*.—This is but to elude the act, and is no more than an action of trespass: And, *per Atkins*, it is within the words of the statute, for the statute says, *and other personal actions*, unless the title of the lands come in question: and here it is plain the title might come in question, for the plaintiff says that he was possessed only of such lands.

*Scroggs*.—This differs not from a plain action of trespass, but in the *per quod* he lost the profits.

But the plaintiff produced a roll in Mich. Term, 1675, where upon debate they had adjudged it contrary, and therefore they gave no judgment; but said, they would confer with the justices of the King's Bench, that they might agree generally upon this point in what they did.

[ \* 227 ]  
*Vid.* 8 & 9 Will.  
3, c. 11.

*North* said, that law was inconvenient in some particulars, which it is fit for the parliament to consider of; for in many cases for small trespasses there is no remedy at all in inferior Courts; as where the defendant lives in another county, and out of its jurisdiction, or where *liberum tenementum* is pleaded. *Adjournatur*.

## (C. 234.)

Where a writ of dower was brought against several purchasers, the sheriff was directed to charge all proportionably. 1 Vern. 218.

WHERE a writ of Dower was brought against several purchasers, the Court directed that the sheriff should charge them all proportionably, though otherwise the sheriff might have charged all out of one party, and the party could have no remedy at law; but in Equity they ought to be all equally charged; and therefore the Court gave this direction.

## DE TERM. S. TRINITATIS, 1677.

IN COMMUNI BANCO.

## (C. 235.)

ADESON v. SIR JOHN OTWAY.

S. C. 2 Ventr. 31. 1 Mod. 250. 2 Mod. 233. 3 Keb. 771.

*Vid.* margin,  
*post*, p. 240.

B. BARGAINS and sells all his lands, lying in the parish of Rippon, to the defendant, and covenants to do farther acts, &c. for assurance; then a common recovery is suffered of 100 acres of land lying in Rippon; and the jury find, that the parish of Rippon did contain several vills, amongst which one was called by the name of Rippon, but B. had no lands in that vill; \* and they find farther, that it was the intent of the parties, that all the lands in the parish of Rippon should pass.

[ \* 228 ]

The question was, whether or no this recovery should pass the lands which lay out of the vill of Rippon, but in the parish of Rippon?

And the whole Court were of opinion, that as this case is, the lands in the parish of R. should pass. 1. Because otherwise the recovery would be void, it being found that B. had no lands in the vill of R. 2. It appears plainly to be the intent of the parties, that this shall be intended the parish of Rippon, [not because the jury have found it, for the Judges said they would not regard that,] but because it appears by the indenture of bargain and sale, that it was intended the parish of Rippon; and here that deed and this recovery make but one assurance, according to *Cromwell's case*, 2 Co., and shall be construed in congruity to the other, as one part of a deed shall by another; just as where a fine is levied by an infant, and a deed to declare the uses, the deed shall bind, because the fine binds, and both make but one assurance.

And *Atkins* said, originally the kingdom, in reference to civil matters, was divided into vills only, and parishes were divisions only in reference to ecclesiastical affairs; and the common law took no notice of them, in so much as a fine was not admitted of lands in a parish; but in process of time parishes became divisions taken notice of in reference to civil matters, and are now used in fines.

And although a place spoken of simply is intended a vill, yet; *stabitur præsumptioni donec probetur in contrarium*; and here is sufficient proof, that it is intended the parish of Rippon, and not the vill of Rippon; and so judgment was given *nisi*.

And they said, it is all one in a recovery as a fine, because that is now become a common assurance, and is not intended adversary (a). 2 Co. 74. [Continued, *post*, p. 240.]

(a) *Ante*, p. 158. *Post*, p. 241.

### BASKETT v. BASKETT.

S. C. 1 Mod. 264. 2 Mod. 200.

THE condition was, that the obligor should either make the obligee such an assurance of an annuity of 20*l.* *per annum* during his life, as the obligee's counsel should advise, within six months, or else that he should pay him 300*l.*

\* The defendant pleaded, that the obligee's counsel did advise no assurance within the six months.

The question was, here being a disjunctive condition, and the one part of it being become impossible by the obligee's default, whether the obligor was not excused from the performance of the other?

And the Court inclined that he was; for where the condition is disjunctive, it is for the benefit of the obligor, and he hath an election which he will perform; and the obligee shall

The Court will not regard the intent of the parties to a conveyance, as found by the jury. 2 Roll. 54.

A parish was originally only an ecclesiastical division, not noticed by the common law, nor used in writs. 2 Mod. 238.

1 Bl. Com. 111, 114. *Prideaux on Churchwardens*, p. 56-7.

Where a place is mentioned simply, it shall be intended to be a vill, unless it appear that a parish is meant. *Post*, p. 241, 318. *Hob. 6. 2 Barn. & Cress. 191.*

( C. 236. )

Where the condition of a bond is, "that the obligor should either [ \* 229 ] make such an assurance as the obligee's counsel should advise, within 6 months, or else pay 300*l.*" it is a good defence to say that the obligee's counsel did advise no assurance, within 6 months (a).

(a) *Cro. El. 396, 539. T. Jo. 95. Com. Dig. Condition, H. 1 Rol. Ab. 446.*

Where the condition is in the disjunctive, and one part is made impossible by the act of the obligee, the obligor is excused from the other: *aliter*, when one part is made impossible by the act of a mere stranger. 1 Bos. & Pull. 242. Com. Dig. Condition, L. 14. D. 1. 3 Mod. 232. Sayer, 243. 6 Term Rep. 710.

not by his own act take away the benefit of this election; for the condition here is in effect no more than this: If he did not make him such an assurance of the annuity as his counsel should advise, he would pay him 300*l.* which plainly appears to be by way of penalty, being twice the value of the annuity.

And the difference was taken, where the obligee or his counsel are concerned, and where a mere stranger; for if the condition were to make such assurance as J. S. should advise, there it is no plea to say J. S. did not advise; for he ought to procure him at his peril to advise; but if it be the counsel of the obligee, there *consilium non dedit advisamentum* is a good plea. Cro. El. 97.

And they denied the rule that is taken in — case in Moor [p. 645], that when one part of a condition is become impossible by the act of God, or the party or a stranger, there the obligor ought to perform the other(*b*); for it is expressly contrary to *Laughter's* case, 5 Co. but the principal case there they said was good law.

(*b*) "This is true only as to the last case, and not to the two first." S. C. 2 Mod. 204. See 1 Salk. 170, pl. 2, where

the ground of *Laughter's* case was denied to be universal: and see *Drummond v. D. of Bolton*, Say. 243, and *post*, p. 269.

( C. 237. )

HARRINGTON *v.* LEECH.

S. C. 1 Mod. 268. 2 Mod. 311.

*Vid.* margin and note to S. C. *post*, p. 242.

March, 151.

*Post*, p. 242.

[ \* 230 ]

Every trader is a merchant within the exception of stat. Lims. *Per Scroggs*, J. Acc. Peake, N. P. 121. *Cont. Ch. Cases*, 152.

UPON a *Computasset*, the défendant pleaded the statute of limitations. The plaintiff replied, that it did concern accounts betwixt merchant and merchant.

The question was, whether this was within the exception in the statute of limitations? And it was held by all, [but *Atkins, qui dubitavit*,] that it was not; for that should be intended of accounts before they were stated, for after they were stated they turned into a debt; and the reason of the exception in the statute might be, because the factors of merchants were many times beyond sea for many years, and so they could not come to state their accounts. But *North*, C. J. was of opinion, if an account was come to a balance, that [*was*] by agreement to run on into a farther \* account, that would be within the benefit of the saving. And three of them were of opinion that this extended to merchants' accounts properly. But *Scroggs* thought that every trader was a merchant within the meaning of the statute.

And *per North*,—Here is a great deal of difference between this action and that of Account; for it was resolved by all the Judges in the case of Sir *Paul Neul*, that in all accounts, where allowances are to be made, no action of the Case will lie, but an Account must be brought, which is the proper action. [*S. C. post*, p. 234, 242.]



## KENDRICK v. BARTRAM.

( C. 238. )

S. C. 2 Mod. 253.

**ACTION** for stopping a water-course. The defendant pleads, that the plaintiff himself had throwed down the dam. Resolved it was no good plea in this action, although it would have been in a *Quod permittat*, or an assise; because there the principal end of the action is to remove the nuisance, which if it be done before, there is no need to proceed in the action (a); but here the action is only for damages, which the party (*per North*) might bring, though he assigned over his estate.

In an action on the Case for a nuisance, it is no plea to say that it was removed by the plaintiff before action brought: *Aliter*, in a *Quod permittat*, or an Assise. *Per North*, C. J., the

plaintiff may bring his action, though he have assigned over his estate.

(a) *Westlen v. Eales*, Fort. 333. Com. Dig. Abatement, H. 50. F. N. B. 426, n. (qto. ed.) 3 Wooddes. Lect. 190.

## EDWARDS v. WEEKES.

( C. 239. )

S. C. 1 Mod. 262. 2 Mod. 259.

**ASSUMPSIT** for 5*l.* upon exchange of a horse, to be paid upon request. The defendant pleaded, that before the action brought the plaintiff did exonerate him of this agreement.

Resolved it was no good plea; for though a parol agreement may be discharged by parol, before cause of action accrued; yet after that it cannot be discharged but by deed (a); and here the cause of action did accrue at least upon the request, and therefore he should have pleaded the exoneration before the request.

A parol agreement may be discharged by parol, before any cause of action accrues; but not afterwards. *Cro. Car.* 384. *Ante*, p. 196.

(a) Or by accord and satisfaction. *Buller N. P.* 152.

## WALWIN v. AWBREY.

( C. 240. )

S. C. 2 Mod. 254. 1 Mod. 258: and *semb.* S. C. 2 Vent. 35. 3 Keb. 829.

**TRESPASS** for taking four loads of wheat, four loads of barley, &c.

The defendant pleads, that the plaintiff was impropriator of the rectory of B. and that the chancel of that \*church was out of repair, and that the plaintiff being cited into the Spiritual Court, and refusing to appear, the ordinary did grant a sequestration; and that the defendant did, by virtue of that sequestration, seize the wheat and barley, &c. which was set out for tithes, to employ the same upon the repairs of the chancel. And the plaintiff demurred.

*Semb.* The tithes of lay impropriations [ \* 231 ] may be sequestered by the ordinary for the repair of the chancel. *North*, C. J. *dissent.*

The only question was, whether or no, in case the impropriator did neglect to repair the chancel, the ordinary might sequester the profits of the rectory to repair it?

1. It was agreed, that in many cases the ordinary might sequester, as in case of non-residence, vacancy or deprivation, because he is intrusted to see the cure served. *Hob.* 144.

*Burn's Ecc. L. tit. Sequestration.*

2. They did seem to admit, that whilst those rectories were in the hands of those to whom they were first appropriated,

viz. spiritual persons, the ordinaries might sequester, as in this case.

But it was insisted upon, that since the statute of dissolution they are become lay-fees, even so much, that before the statute. 32 H. 8, it was doubtful what remedy they should have for recovery of them, and that statute enables them to sue in the Ecclesiastical Court (a).

*Baldwin* argued *pro def'*, and distinguished between *appropriations*, which were when they were in the hands of those to whom they were appropriated; but since the statute, that they are come into lay-hands, they are called *impropriations* (b); and he said, that the conusance of repairs of the church did properly belong unto the Ecclesiastical Court; and cited Nat. Brev. 50. M. Register, 44, 48. Janes de Atham, 54. Linwood, 136. 5 Co. Ecclesiastical Persons, 9. Davies, 70. Vaugh. 326, that lawful canons are a part of the law of the land. Reg. Jud. 22, 26. And he said, that if an execution be against one, and the ordinary [*Sheriff?*] returns, that he is *Clericus beneficiatus non habens laicum, &c. sed habens curam ecclesiæ*, that then a writ at this day goes to the ordinary, to levy the same on his ecclesiastical goods, glebe, tithes, &c. which he doth by sequestration.

But to that it was answered by *North*, Ch. J. that in that case the ordinary is but the ecclesiastical sheriff (c); and therefore, in the case of Bishop *Wren*, the Court compelled him to make the same return as the sheriff should have done in the like case, and refused to accept of his return, that he had granted a sequestration, but would have either a *Fieri feci* or *Nulla bona* (d).

\* It was admitted by all, that the Ecclesiastical Court had properly conusance of the matter, and that they might proceed, by way of personal censures, to excommunication against the impropiator. 2 Roll. 211.

But for the matter in law *North*, C. J. inclined, that the ordinary could not sequester now it was become a lay-fee; but the other three Judges inclined *contra*; because the repair of the church was a charge originally inherent in those tithes, and that it was *onus reale* that should go along with them (e).

(a) On the doctrine, that impropriations have become lay fees since the stat. of Dissolution, see Gibs. Codex, in note to 29 Car. 2, c. 8, 2 vol. tit. 30, c. 14; and *Lutton v. King*, 3 Salk. 378.

(b) See this distinction between impropriations and appropriations disputed, in 1 Burn's Ec. Law, tit. *Appropriation*, I. note (5), Tyrw. edit.

(c) See S. C. 1 Mod. 260. 2 Mod. 257. *Languit v. Jones*, 1 Stra. 87. *Hubbard v. Beckford*, 1 Hagg. 307. *R. v. Bishop of London*, 1 Dow. & Ryl. 486. And the sequestrators are in the nature of bailiffs to him. Bunb. 192.

(d) But the opinion of Scrjt. Hill seems to have been, that the bishop may return a sequestration: for if he returns *feri feci*, he may be ruled to bring the money into court; and if he returns *nulla bona*, when the defendant has an ecclesiastical living, he will be liable in an action for a false return. 1 Sid. 276. See the note to Burn's Ec. Law, tit. *Sequestration*, Tyrw. edit. On the form of return to a *levari facias* to the bishop, see *Marsh v. Fawcett*, 2 H. Black. 582.

(e) The opinion of the Court is similarly reported in 1 Mod. and in the Anonymous case in 3 Keble, which ap-

2 Inst. 4. Sty. 161, 168. To a writ of *fi. fa. de bonis ecclesiasticis*, the ordinary cannot return that he has granted a sequestration, [ \*232 ] but must return *feri feci*, or *nulla bona*. In such case the ordinary is in the nature of an ecclesiastical sheriff. The lay impropiator is liable to censure and excommunication for non-repair. 3 Kebl. 829. Post, C. 360.

And *Atkins* said, the impropriation was only of the surplus of the profits, and this was a charge precedent; and they said, that impropriators are liable to procurations and synodals.

Impropriators liable to procurations and synodals. 2 Ventr. 35.

Another question was made; admitting that the ordinary might sequester, yet whether the party might justify by it at common law? And *Atkins* seemed to think he might; and so for a sequestration in Chancery, if it were specially alleged to be the custom of that Court time out of mind to grant such sequestrations (*f*). *Sed adjournatur*.

In an action of trespass the defendant may justify under a sequestration out of Chancery, or the Ecclesiastical Court. 2 Mod. 258. 1 Mod. 259.

pears to be the same. So in *Degge*, Part 1, c. 12, the "better opinion" is said to have been in favour of sequestration. But in 2 Mod. and in 2 Ventr. (which latter case is either the same with the principal one, or very much like it, though of an earlier date) the court is

represented to have been against the power of the ordinary. See the observations in *Gibson's Codex*, 1 vol. tit. 9, c. 5.

(*f*) Judgment was given against the defendant, for the defects of his plea. See 2 Mod. 259, and 2 Ventr. 35.

### SAUNDERS v. TAYLOR.

THE jury found, that the lands in question did belong to the dean and chapter of York, and they have been usually let, excepting the great woods and underwoods growing upon the same, allowing to the tenants sufficient bote and estovers; and that in the late times the said woods were wasted and cut down; and that at the time when the lease was made to the defendant there was not sufficient wood upon the land for usual bote and estovers; and that the lease was made to the defendant by the predecessor of this dean, without any exception of the woods, reserving the ancient rent.

The question was, whether this was a good lease to bind his successor the present dean?

And *North*, C. J. inclined that it might be well enough; it being found that there were no more woods upon the land at the time of the demise than were sufficient for usual bote and estovers; so that although the woods did pass, yet it was no more than what the former tenants had in reality; for although the woods were excepted in their leases, yet it appears by the special verdict, that there was an allowance of estovers and bote.

(C. 241.)

Where lands of a dean and chapter have been usually let excepting the woods and underwoods, and allowing the tenant sufficient bote and estovers; a lease without such exception is not binding, though the woods had been so wasted and cut down at the time of the demise, as not to leave sufficient bote, &c. *North*, C. J. dissent.

\* But the other three Judges inclined *contra*; for although there were not woods at the time of the demise sufficient for bote and estovers, yet these woods may grow again; and it is not found that they were destroyed, but only wasted and cut down; and without question, if the woods had been growing at the time of the lease it had been a void lease (1); *quod fuit concessum per North*; for the inheritance of the wood is an inheritance distinct from the land (2), and one man may have the inheritance of the wood, and another of the land.

[ \* 233 ]

(1) Acc. Cro. Jac. 458-9.

(2) 5 Co. 11. 1 Leon. 247.

And although the former leases were allowing sufficient bote to the tenants, yet that did enure by way of covenant only, and the woods did not pass by the demise. *Et adjournatur*.

The allowance of bote enures only by way of covenant, and does not pass the wood.

## DE TERM. S. MICHAELIS, 1677.

IN COMMUNI BANCO.

**MEMORANDUM.** This Term there was a call of Serjeants, thirteen in number; of the Middle Temple only one Serjeant, *Rawlins*; of the Inner Temple, *Street, Holloway, Simpson, Dolbin*, Recorder of London; of Lincoln's Inn, *Stroud, Shaw*; of Gray's Inn, *Holt, Baldock, Raymond, Gregory, Weston*.

The motto of their rings, *Gratia Regis, non operibus legis*.

The motto of the last call before was, *Rege et lege felices*.

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( C. 242. )

*Indebitatus assumpsit* lies for tithes sold. A parol lease of tithes for one year is good, by way of sale; but a lease for a longer time must be by deed.

**INDEBITATUS ASSUMPSIT** for tithes sold. *Baldwin* moved in arrest of judgment, that this sounds in the realty, and so an action of the case will not lie. But *per Curiam*, it is well enough; for this shall not be intended a lease of tithes, but a sale of tithes. And *per North*, C. J. a lease of tithes cannot be for more than a year, without deed, and it is not good by way of lease for one year, but so it enures by way of sale. 2 Roll. 63 (a).

(a) See Bac. Ab. Leases, (E), 5th ed. p. 336-9, and Gwill. notes, *ibid.* *Id.* tit. Tithes, Y, where the old cases are collected: and see further, 2 Show. 307. 1 Lev. 141. 8 Mod. 62. 1 Stra. 525. 1

Barn. & Cressw. 488. 3 Burr. 1874-5. *Keddington v. Bridgman*, Bunb. 2. *Hewit v. Adams*, 7 Bro. P. C. 64. *Paynton v. Kirkby*, 2 Chitty Rep. 405, and Watson's Clerg. Law, c. 42.

( C. 243. )

## HARRINGTON v. LEECH.

S. C. ante, p. 229. Post, p. 242.

THE question was, whether an account betwixt merchants, after it is stated and reduced to a certainty, be saved by the proviso in the statute of limitations, which excepts accounts betwixt merchants?

*Per North* and *Windham*,—It is not; but is barred by the statute as well as any other action upon the case.

But *Atkins* and *Scroggs* *semble e contra*; for that the statute seems to have a special regard unto merchants who are very beneficial to the commonwealth, and are many times in foreign parts, and therefore cannot at all times take that speedy order for the recovery of their debts, as other persons may; and there is the same reason that this benefit should be saved to them after an account is stated, as well as before. And *per Atkins*,—This proviso doth not extend to any other accounts than such as are between merchants: and they said, that this statute did bar a man of his remedy to recover his right which he had at the common law, and therefore should not be extended farther than the words did import: and it is observable in the statute that the words are, "All actions of account or upon the Case, (other than accounts betwixt

Actions on the case are within the exception of

merchants, &c.) if this parenthesis had immediately followed the stat. Lims. actions of account, then it might have been intended to have respecting mer- excepted actions of account only; but the words "Actions of chants' accounts. the Case" intervening, it doth seem to imply, that actions of *Per Atkins, J.* the Case for any debt upon account betwixt merchants may 2 Saund. 127 d. be intended. *Sed Curia advisare vult.* n. (7).

*North* said, he could never understand the reason, why Cro. Car. 246. the right of action was preserved if the plaintiff were beyond 3 Mod. 312. the sea, but not when the defendant was beyond \* sea. *Sed* [ \* 235 ] *semble a moy, q' les parols del statute provide pur le plaintiff* *touts* (1).

*Nota q' fuit dit al moy per Serjeant Rawlins*, that Judge (1) See now *Atkins* asked the opinion of the Judges of the King's Bench, 4 & 5 Ann. c. 16. and they were of opinion, that where the account was stated, 2 Saund. 125. it was not within the exception, but would be barred by the statute.

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GYLES v. KEMPE.

( C. 244. )

B. DEVISES to C. and D. and if either died, the other should be his heir. The question was, whether or no C. and D. had an estate for life or in fee? and it having been argued by Serjeant *Borrill*, that they had but an estate for life, Serjeant *Maynard* was to maintain that they had a fee; but he threw it off upon another point; for the plaintiff made his title as lessee unto F. and G. the daughters and heirs of the devisor, and H. who had purchased the part of E. another daughter of the devisor; and the plaintiff declaring of one lease from F. G. and H. it appearing that H. was but tenant in common, and not joint-tenant nor parcener, the plaintiff could have no judgment; for if two tenants in common join in a lease, the law construes this to be several leases and respective confirmations; and so it appeared by the special verdict, that it was not such a lease as the plaintiff had declared upon (a).

When two tenants in common join in a lease, it operates as the several lease of each, and the confirmation of the other: and it cannot be pleaded as a joint demise. 6 Co. 15. 1 Inst. 45.

(a) Acc. *Heatherley v. Weston*, 2 Wils. 232. See *Doe v. Wippell*, 1 Espin. 360. *Doe v. Read*, 12 East, 61.

( C. 245. )

It was agreed, that a release of all debts, duties, and demands, did not release covenants that were not broken; nor any other word but the word "covenant."

A release of "all debts, duties and demands," does not discharge a

covenant unbroken: but the word *covenant* must be used. Co. Lit. 292 b. *Post*, p. 367. Cro. Jac. 170. 2 Mod. 281. 2 Lev. 206.

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JUSTICE BALE'S CASE.

( C. 246. )

*S. C. Atkins v. Bayles*, 2 Mod. 267.

In an action of debt against him *Tam quam* for the 100l. penalty upon the statute against conventicles, for refusing to disturb, having notice; he pleaded outlawry to the in-

In debt *qui tam* outlawry of the informer is a good plea: but the king may

proceed for his share. Com. Dig. Abatement, E. 2. 1 Vin. 212-3.

[ \* 236 ]

( C. 247. )

In Case for a nuisance to a house, the plaintiff in his declaration states a seisin in right of his wife, and demands damages for an injury to the inheritance:

*quare*, if the action be maintainable in this form without joining the wife? The wife may join as plaintiff, where the action would survive to her; and she may join in many cases where she is not bound to join.

*Per North, C. J. Vid. 1 Wils. 124. Bunb. 277. 2 Wils. 423-4.*

former. It was held, that this was a good plea to bar him, so that he could not proceed; but notwithstanding it was held, that the king might proceed for his share.

### FROSDIKE v. STERLING.

S. C. 2 Mod. 269.

**ACTION *sur le case*.** The plaintiff declares, that he was seised of a house in the right of his wife, and that the defendant did erect a house of office so near to his house, that it did annoy it, and did founder the foundation of his said house; and also did dig a pit, and thereby did ruin the foundation of his said house.

Verdict for the plaintiff, and intire damages.

Moved in arrest of judgment by Serjt. *Stroud*, because the wife was not joined; and it appears, that part of the damages were given for the prejudice of her inheritance; and in such a case, though damages only are to be recovered, yet she ought to have been joined; and he cited these authorities, 20 H. 6, l. 7 Ed. 4, 15. 7 H. 4, 21. Cro. Eliz. 608, 613. 2 Inst. 650. Cro. Car. 418, 437, 503, 505. 11 H. 4, 16.

*North, C. J.*—If the plaintiff had declared only, that he was possessed, and had not taken notice of the estate of the wife, and demanded damages for the annoyance of him, it might have been good enough, without joining the wife; but here, when of his own shewing it appears to be the wife's inheritance, and he demands damages for the prejudice done to the inheritance, viz. for foundering the foundation of the house, it seems that the wife ought to have joined; but there is no question but the husband might have joined the wife, if he would; for he said, he always took it for an unquestionable rule, that wheresoever, in case the husband should die, the action should survive to the wife, that there the wife might join; but on the other side, the husband may join the wife in many cases where he is not bound to join her, but may have that action alone. *Per Curiam*.—Let judgment stay till the other side move (a).

(a) "In an action for a tort during the coverture, if it may be to the damage of the wife, if she survive, as well as of the husband, they may join, or the husband may sue alone." Com. Dig. Baron & Feme, X. And in Bac. Ab. same title, (K), the above case is cited, to shew that the action lies by the husband alone.

( C. 248. )

### COCKRAM v. WELBY.

S. C. 1 Mod. 245. 2 Mod. 212. 2 Show. 79.

Debt against the sheriff for money levied to the plaintiff's

A SHERIFF having levied money upon a *Fi. fa.*, he, for whose use it was levied, brought an action of debt against the sheriff for the money (a).

(a) The report in 1 Mod. calls it an action on the Case; and the declaration appears by all the other reports to have been special. In 1 Mod. 246, it is said,

that *indebitatus assumpsit* would have lain, and then the statute had been pleadable.



\* The sheriff pleaded the statute of limitations; and the sole question was, whether this was an action that was within that statute?

And it was resolved by *North*, *Windham*, and *Atkins*, (*Scroggs contra*) that the statute of limitations was no bar in this case, because this action is grounded partly upon matter of record; for the *Fi. fa.* issueth out of this Court, and is returnable here.

But in this case the sheriff had made no return of his writ; and therefore *Scroggs* said, he was only chargeable by the receipt of the money, which was an act *in Pais*; and for that reason he did conceive he should be within the benefit of this statute; just as if I give a man a bond to receive money for me, I may have an action of debt against him for the money, and this statute there shall be a good bar; and the original debt was founded upon a deed. But *North* said, that case is not like ours; for there the party himself makes choice of the other to receive the money, and so there is *quasi* a contract betwixt the parties; but in our case the sheriff is an officer imposed by the Court. *Scroggs*.—If he had made his return, then he had been chargeable by that, and then I should have been of opinion that the statute should be no bar. *North*.—It is his fault that he makes not his return, and therefore he shall not take advantage of it. And they said, the reason why this statute is no bar in debt for tithes, is, because it is founded upon a statute (*b*); and so when an attorney sues for fees, his debt appears partly upon record (*c*). But for *damage clere*, they agreed it was a bar (*d*).

Judgment was given by the three Judges *pro quer.*

(*b*) Cro. Car. 513. But see 53 Geo. Thomas, 3 Lev. 367. 1 Ld. Ray. 2, S. C. 3, c. 127.

(*d*) The fee, called *damage clere*, is

(*c*) 1 Mod. 246. But see *Oliver v.* abolished by 17 Car. 2, c. 6.

#### JUDGE ARCHER'S CASE.

( C. 249. )

HE obtained a judgment against A., then A. died, and a *Sci. fa.* issued against the tertenants; some of them, that were summoned and appeared, pleaded, that B. and C. were tertenants, and were never summoned; and it was moved, that this, since the statute of 16 and 17 of this king, cap. 5, was a frivolous plea.

A *sci. fa.* against terre-tenants upon a judgment is not within 16 & 17 Car. 2, c. 5, which relates only to extents executed. Acc. *Prynne v. Slougher*, 2 Ventr. 104.

[ \* 238 ]

But the Court did incline, that a *Sci. fa.* upon a judgment before an extent was not within the meaning of that statute; for the words of the statute are, "after (*a*) any judgment, &c. shall be extended," and the *Sci. fa.* is before the ex\*tent; but after an extent the execution shall not be avoided by any of the matters mentioned in that statute; and so *Pemberton* did affirm it had been resolved in the case of *Lake* and *Bucknam* in the King's Bench, upon a solemn debate.

(*a*) "When any judgment," &c. are the words. *Vid.* s. 2.

## ( C. 250. )

## COCKLEY v. PAGRAVE.

Where the plaintiff new assigns a trespass in a different place, he should conclude with a verification only, without praying judgment for not answering the trespass newly assigned: but it is only form.  
Carth. 176.

TRESPASS for taking his cattle in Newmore.

The defendant saith, that the place where he took them was in Stone-Hill, and justifies, for that it is his frank-tenement.

The plaintiff replies, that there is a river runs through Newmore, and that the north side of it is Stone-Hill, but that he took the cattle on the south side of the river; and concludes, *Hoc paratus est verificare*; and, because the defendant hath not answered to the trespass in this place newly assigned, demands judgment.

The defendant demurs generally. And it was urged, that this replication was not well concluded; for he ought to have stopped at *Hoc paratus est verificare*, and not have demanded judgment for not answering the trespass newly assigned, when it was impossible he should answer it before it was alleged (a).

But it was said *per Curiam*, That this is but matter of form, and though it be not so formal, yet the defendant not having shewed it for cause, cannot take advantage of it, although it had been proper only to have averred it; or else he might have traversed, *absq. hoc*, that he took the cattle at Stone-Hill. And it was said by *North*, Chief Justice, that a new assignment cannot be in a replevin, for there the party must shew the place in certain at first where the taking was: And it hath formerly been doubted, whether a new assignment might be in a trespass for taking goods; but, 2 Cro. 141, it is resolved that it may: But it is generally used in trespass *quare clausum fregit*.

(a) But the usual practice is to add newly assigned is always considered as such a prayer of judgment; and it is having been already stated in the declaration, and consequently the defendant observed in 1 Chitty's Treat. on Pleadings, p. 613, 2d edit. "that the matter might have answered it."

There is no new assignment as to place in replevin.  
1 Saund. 347 a. n. Hob. 16.

In trespass for taking goods, plaintiff may new assign.  
Buller, 92. 2 Salk. 453. 1 Saund. 300 a. n.

## ( C. 251. )

## FLEMING v. SIR THOMAS LEE and KEMP.

S. C. cited 2 Mod. 265.

To the process in *Quare impedit*, the sheriff must not return fictitious sum-

[ \* 239 ]  
moners and mainpernors.  
1 Mod. 248. 2 Mod. 264. If in such a case the sheriff returns the defendant summoned, whereby judgment is had by default, a writ

A SUMMONS issued out against the defendants, and they being summoned, Kemp, the incumbent, cast an essoin, but neither of them appeared; whereupon an attachment issued out, and after that a *Distringas*, which were both returned served by the sheriff; and mainpernors returned \* John Doe and Richard Roe, and the defendants after that not appearing, the plaintiff had judgment by default, and a writ to the bishop.

And the Court was moved by the defendant to set aside this judgment, for that the attachment and *Distringas* were never really executed; neither were there any real Mainpernors; and so this judgment was obtained by deceit.

And the doubt was, because the defendant had cast an

essoign, which did conclude him to say there was no summons; and then if the party had once notice, though the attachment and *Distringas* were never really served, yet it was argued that the judgment was good by the statute of Marlbridge, cap. 12.

of Disceit, original or judicial, lies, or the Court will relieve upon motion. Casting an essoign will not preclude the defendant from alleging that he was not summoned. 2 Mod. 265.

The authorities insisted upon were 11 H. 6, 3. 2 Inst. 124. 6 Ed. 4, 3. 36 H. 6, 23. 26 H. 6, 8. Dyer, 261. 29 Ed. 3. 42, 43. Dr. & Stud. 125, 126. 21 H. 6, 56. 11 H. 6, 3. 27 H. 6, 5. 50 Ed. 3, 9. Bro. Attachment, 9. Kitchin, 255. Nat. Br. 98. Rastall, 217, 270.

In this case it was agreed, that at the common law, if the party did not appear, the plaintiff could never have had judgment, but must have had a distress infinite; and to remedy that mischief, the statute of Marlbridge was made; and since that statute all the processes ought to be duly served, or else truly returned by Nichil, and not to pretend fictitious summons and mainpernors; for in a writ of deceit, if the party alleges, that whereas he was returned summoned, that he was never summoned; yet there is no way to try that but by examination of the summoners and mainpernors respectively: And here would be a great inconvenience, for here were never any such men as are returned mainpernors; and so a man shall lose his right by a contrivance, and have no remedy.

2 Inst. 124.

8 Viner, 495, &c. F. N. B. 221, (quarto).

2 Roll. 581.

If the persons returned summoners die before examination, the party is without remedy, because there is no other way of trial.

It was likewise agreed, that the casting of an essoign is no appearance, but is an excuse for not appearing.

An essoign is no appearance, but an excuse for not appearing.

And *per North*, Chief Justice.—The party that is surprised in this case hath three remedies, either by original writ of deceit, that issueth out of Chancery, and is returnable in this Court, and is as it were in the nature of a commission; or else he may have a writ of disceit judicial, grounded upon the record, here issuing out of this Court; or else they may examine it upon motion, as they do other judgments obtained by fraud, or by undue practice.

\* It was objected, that the incumbent was now in, and had [ \* 240 ] given bond for the first fruits, &c.

But to that the Court answered, that, if a judgment were gotten by practice or surprise, they would examine it any time, though it were ten years after; and so the prothonotaries said was the practice.

A judgment obtained by fraud or surprise, is examinable at any distance of time.

And they said this was the very case in Nat. Br. 98; for there it is said, if the summoners or perners, &c. do not do their duty, the party shall be restored; and thereupon they ordered the judgment to be set aside upon motion, without bringing a writ of disceit: and cited the case of *Long and Serle* (1) in this Court, where they had formerly done the same.

(1) &c. 1 Mod. 248. 2 Mod. 264.

Mainpernors.

And it was said, that the mainpernors were not to summon the party, but the sheriff was to deliver the goods to them, and they were to undertake for the appearance of the party.

## DE TERM. S. HILARII, 1677.

IN COMMUNI BANCO.

( C. 252. )

ADESON v. SIR JOHN OTWAY.

Continued from p. 228.

B. bargains and sells all his lands in the parish of Rippon, and thereupon suffers a recovery

[ \* 241 ]

of 100 acres of land, lying in Rippon. The jury find that the parish of R. contains several villis, and among others one called Rippon, in which B. had no lands. Held, that the recovery is explained by the deed of bargain and sale, and therefore extends to all B's lands in the parish. 1 Mod. 206. 2 Mod. 47.

Cowp. 346. 5 Cruise's Dig. 2d edit. 419. 4 Cruise's Dig. 319.

(1) 2 Burr. 1134. 5 Burr. 2787.

A recovery may be suffered of an advowson. 2 Wils. 116.

Now this case was argued again by *Maynard pro quer'*, who cited Cro. Car. 269. Moor, 720. 2 And. 7. 2 Cro. 120, 174, 240, 573. 1 Inst. 125. It was objected by him, that if the deed should cause the recovery to extend to lands in parishes, it would be very mischievous; for a deed might be kept in a pocket, and so \*no body could tell by the record, whether the land in the vill or the parish (both being of a name) should be included. But to that the Chief Justice answered, that there was the same inconvenience where a man had twenty acres, and levied a fine of ten, there the deed must explain which ten should pass.

And it was argued *pro def'* by Serjeant *Raymond*; and they confessed, that formerly the law was more strict in the distinction between villis and parishes; but now, since common recoveries have been looked upon as common assurances, the law hath not been so nice: As a reputed manor would not pass where a manor was demanded. Lat. 63: but now the contrary is resolved in Co. Sir *Moyle Finch's* case; and he cited 2 Co. 76. 2 Cro. 251. 5 Co. 46. 2 And. 124. Ow. 60, 119. Moor, 710. Dyer, 261. [1 Vent. 51. 1 Lev. 27.]

And he said he knew but three cases where the law was so strict to distinguish betwixt villis and parishes, and that was in the case of the king, in *brevibus adversar'*, and where the intent of the party did appear to the contrary.

And *per Curiam* judgment was given for the defendant; for that it appearing plainly by the deed of bargain and sale, that the intent of the parties was, that the recovery should extend to all his lands, as well in the parish of Rippon, as in the vill of Rippon; that the deed and the recovery, according to *Cromwell's* case, should be looked upon as one assurance (1), and that one should be explained by the other.

And although a place spoken of simply shall be intended a vill, yet it may be extended to a parish where the intent of the parties doth so plainly appear. [*Ante*, p. 228.]

And now common recoveries have been esteemed as common assurances, only the law is not so strict in them as formerly it was, as appears in Sir *Moyle Finch's* case, and *Dormer's* case, where it was suffered of an advowson.

## PRIDGEON'S CASE.

( C. 253. )

THE plaintiff sets forth, that he was seised in fee of the advowson, and presented A. who took another benefice, and so the church became void *per acceptationem alterius beneficii*; and the defendant demurred, because he doth not shew the value of the second benefice, nor that there was cure of souls belonging to it.

In *quare impedit*, the patron sets forth an avoidance by accepting a second benefice: it is unnecessary for him to state its value, or that it had a cure of

And resolved *per Curiam*, that he need not, the plaintiff himself being rightful patron; but otherwise it is, if the \* plaintiff did go to intitle himself by a lapse, there he ought to shew these particulars, that it might appear to be a cession within the statute [21 Hen. 8, c. 13,] that the patron ought to take notice of.

[ \* 242 ]

souls. *Aliter*, where the plaintiff entitles himself by lapse upon such an avoidance.

But to the patron it is sufficient, that the benefice be void; and although the second benefice be but of the value of 20s. *per annum*, yet the patron may take notice of it, if he will; but he is not bound to take notice of it, according to *Holland's case*, 1 Co. (a). And if issue be taken on *vacavit per cessionem*, yet if it be found *quod vacavit per mortem*, it is for the plaintiff, if he be patron, according to 1 Inst. 282. And so the demurrer was over-ruled.

The patron may take notice of an avoidance by plurality, where he is not bound to do so. *Ante*, p. 26. 2 Gibs. Cod. 946, n. 1st edit.

Upon issue taken on *vacavit per cessionem*, a verdict finding *quod vacavit per mortem* is for the plaintiff.

(a) The patron is bound to notice it when the case is within stat. 21 Hen. 8, c. 13, i. e. when the first benefice is of the value of 8l. or more, *per ann.* *Ante*,

*Shute v. Higden*, p. 51-2. But the value of the second benefice is immaterial. *Ibid.* and *Vaugh.* 131.

## HARRINGTON v. LEE.

( C. 254. )

S. C. ante, p. 222, 234.

Now the Court gave judgment *und voce* for the defendant; there being two cases cited by Serjeant *Weston* in the point, *Martin v. Delvo* (b), Trin. 20 (22) Car. 2. Rot. 1558, (1588), in B. R. and another between *Webb v. Tybell* (c), Cro. Car. 245. And Justice *Atkins* cited *Jones*, 401, for they all held, that when an account is stated, there is the end of the account, and then an *indebitatus computasset* will lie; which will not before the account stated, because allowances are to be made for charges and casualties (d); but they did incline, that if an account was stated, and reduced to a certain sum, yet if there were farther dealings betwixt the parties, and that sum was to run on in account, then that was part of the account current, and an action of account would lie; and

*Indebitatus assumpsit* upon an account stated is barred by the statute of Limb. Where a sum found due upon an account stated is suffered to run on in a further account between the parties, it again becomes part of an account current (a). 15 Vin. 109, 110, and notes to *Webber v. Tivill*, 2 Saund. 124. 18 Ves. Junr. 286. 2 Eden, 169.

(a) And is "slipped out of the statute again." *Per North*, C. J. 1 Mod. 270. *Ante*, p. 229, 233. An account of the debate, in which the exception in the stat. respecting merchants' accounts was suggested, is to be found in 2 vol. p. 100 of the Proceedings of the House of Commons in 1620 and 1621, published from MSS. at Oxford in 1766.

(b) S. C. 1 Mod. 70. 1 Vent. 89. 1 Lev. 298.

(c) *Quare*, *Webber v. Tivill*, cited in *margin*?

(d) See 1 Salk. 9. 12 Mod. 517. *Scott v. Mackintosh*, 2 Camp. 238. *Tomkins v. Wiltshire*, 1 Marsh. 115. S. C. 5 Taunt. 431.



notwithstanding *Atkins* and *Scroggs* doubted at first, yet now they were clear of opinion for the defendant.

( C. 255. )

SIR JOHN MASHAM v. GOODERE.

When a lease for years is made to be void on non-payment of rent, an actual demand is necessary to avoid it. *Aliter*, if it is to be void on non-payment of a sum in gross.

When a disseisor, who has long been in quiet possession, dies seised within 5 years after an entry by disseisee, the entry is not tolled. 32 Hen. 8, c. 33.

TRIAL at bar for Heythorp in Oxfordshire.

Resolved, that when a lease for years is made, reserving a rent, and for non-payment that the lease shall be void, the lease is not void by non-payment without an actual demand; because a rent is not properly due till it is demanded; but otherwise it is if it be to be void for non-payment of a sum in gross (a).

It was likewise held, that if a disseisor be in quiet possession for many years, and then the disseisee enters, and the disseisor continues the possession, and dies any time within five years, the entry of the disseisee is lawful upon the heir within the statute; for when the disseisee enters, and the disseisor continues the possession, this is a new disseisin, and so it is *toties quoties* the disseisee enters. 1 Inst. 288 a. [1. tt. s. 429, 430.]

(a) *Ante*, p. 24. *Post*, p. 414. 2 Mod. 264. Bro. Demaund. pl. 19. *Ibid.* Con- ditions, pl. 216. Co. Lit. 201 b. 18 Vin. 524.

( C. 256. )

TAYLOR v. BYDALL.

S. C. 2 Mod. 289, and see Carter, 182.

A. had a sister, who married and had issue a son; her first husband dying, she married B., by whom she had issue a son C. and a daughter D. A. devised to his sister, till her son C. should attain the age of 21 years, and then to C. and his heirs; but if C. should die before he came of age, then he devised to the heirs of the body of B. C. died before the age of 21, in the life of B. Held, that A.'s sister, (who was also his heir)

RICHARD BELL, who was seised in fee of the lands in question, had a sister Mary, who married Smith, by whom she had a son, Augustine Smith, the lessor of the plaintiff: and that husband dying, she married one Robert Wharton, by whom she had issue Bell a son, and Mary a daughter, who was the defendant.

R. Bell devised his lands to his sister till her son Bell should attain the age of twenty-one years; and after Bell should attain the age of twenty-one years, then to him and his heirs; but if Bell should die before he came to the age of twenty-one years, then he devised the lands to the heirs of the body of Robert Wharton; Bell died before the age of twenty-one, in the life of Robert Wharton (a).

In this case it was held *per Curiam*,

1. That Mary by this devise had an estate for years certain, i. e. for so many years as Bell did want of the age of twenty-one; and this term for years did not determine upon the death of Bell (b); and denied the difference taken in *Boraston's* case, 3 Co. 20, of a devise to executors and to strangers; and Serjeant *Nudigate* cited a case in the King's Bench, where this point was settled in a special verdict.

(a) The executory devise, according to Mod. Rep. was "to the heirs of the body of R. Wharton, and to their heirs for ever, as they should attain their respective ages of 21 years." And see

Carter, 182.

(b) *Lowe v. Holmsted*, 3 P. Wms. 176, and other cases cited in *Doe v. Underdown*, Willes, 301, n. 2 Mod. 201.



And notwithstanding Bell died before the age of twenty-one years, yet after his death the mother was only a termor for years, and was not in by descent.

But it was agreed, that if the devise had been to Bell, when he came to twenty-one years, and no devise made to his mother, that then in the mean time she had been in by descent. [1 Leon. 101.]

2. It was held in this case, that Bell had an estate vested in him upon the death of the devisor; and it did not expect in contingency till he came to the age of twenty-one years; for, though the words are, "After he comes to the age of twenty-one years, to him and his heirs," yet his interest vests presently, but the possession must expect till that time; and compared it to *Boraston's* case, 3 Co. 21, where it is said, that "when" and "then" are demonstrations of time when the remainder shall come into possession; and not when it shall vest(c).

\* 3. The third question was, whether or no this devise to the heirs of the body of Robert was void, Bell dying in the life of Robert, and so there was no heir of his body to take? *quia non est hæres viventis*.

And it was urged by *Nudigate*, that it being in a will, heirs of the body might be a good *descriptio personæ* to design the heir apparent of Robert(1), though in strictness of law there could be no heir in the life of the ancestor; and cited *Style*, 240. *Ow.* 248.

But that notion was utterly denied by the Court; and they held, that devise to the heirs of the body of Robert was an executory devise, and did rest in contingency during the life of Robert and Bell, whilst he was under the age of twenty-one years; and then Bell dying under that age, and in the life of Robert, there could be no heir of the body of Robert to take, and so that devise was void.

*Scroggs* cited the case of *Snow and Cutler* (2), 19 Car. B. R. where it was held, that an executory devise need not vest, as a remainder must, *eo instante* that the particular estate determines; but that the law would support it without a particular estate, and expect till it could take [effect].

But *North* answered, that then there must be an apparent intent of the devisor, that it shall not [vest] till a certain time, notwithstanding the particular estate determines; and that he said was the case of *Snow and Cutler*; for there the devise was to the heir of J. S. when he comes to the age of fourteen years.

But if there be no such apparent intent, it must stand and fall by the rules of law.

And in this case the Court inclined for the defendant; because they said, this executory devise to the heirs of the body of Robert was but contingent, Robert being living, and

took a term of years by the devise, which did not cease by the death of her son C.: that C. took a fee, vesting immediately in interest upon A.'s death, with the possession expectant upon his coming of age: that the devise to the heirs of B.'s body was executory, and became void on the death of C. before B.; and that D. took by de-

[ \* 244 ]  
scent the fee which had vested in her brother.

(1) *Post*, p. 458, 472.

(2) *S. C.* 1 Lev. 135. *T. Ray.* 162. 1 *Sid.* 153.

8 *Viner*, 113, 114.

(c) See 1 *Burr.* 228, 234. 1 *W. Bl.* 519. *Willes*, 223. 3 *Bro. & Bing.* 121. *Fearne Ex. Dev.* p. 546, 7th edit.

Bell dying in the life of Robert, it was become void; and then this fee that was in Bell, determinable upon a contingency, was now become absolute; because the executory devise was become void, for the sake of which it was determinable; and the heir shall take no advantage by it, though this executory devise be void (d).

Devise to an infant *en ventre sa mere*, is good. *Post*, C. 344 b.

[ \* 245 ]

And *North* said, that a devise to an infant *en ventre sa mere* was formerly held void, for that the infant not being born, there was no person to take: but at this day it is held good; because the law shall intend, that the devisor did intend it to him when he should be born; so that it works in the nature of an executory devise; and where it appears, that the testator did not intend it to be executed \* presently, there it shall wait; and that shall be supposed the intent of the testator in this case (e). [*By the opinion of the whole Court, judgment was given for the defendant.* 2 Mod. 293.]

(d) According to 2 Mod. 292, the Court is represented to have said that upon the death of Bell without issue the defendant was his heir and had a good title, if not as heir at law, yet she might take by way of executory devise *as heir of the body of her father*. The case has been therefore considered as an authority for extending an executory devise twenty-one years beyond a life in being; for there could be no heir of the body of R. Wharton till his death, and the estate was not to vest in such heir till the age of twenty-one. See *ante*, note (a). *Fearne Ex. Dev.* 432-3. 7th edit. *Stephens v. Stephens*, C. T. Talb. 228; and the remarks of Ld. Hardw. in *Lovell v. Lovell*,

1 Atkins, 12. Mr. Hargrave observes upon it that "it was a decision by the Com. Pleas while Lord North was Chief Justice, and he concurred in it; and I know not how entirely to reconcile it with the strong part he afterwards took against the executory trust of a term of years in the great case of the Duke of Norfolk, except that distinctions between inheritance and terms of years were relied upon in a great degree." 2 Harg. Jurid. Arg. p. 36.

(e) Acc. *Chapman v. Blisset*, C. T. Talb. 145. *Gulliver v. Wickett*, 1 Wils. 106. *Fonbl. Treat. Eq. B. 2*, ch. 3, § 6, note (d); and see 2 Harg. Jurid. Arg. p. 110-1-2.

( C. 257. )

MORE v. PITT.

S. C. 2 Mod. 287. T. Jo. 153. 1 Vent. 359. Skin. 28. 2 Show. 153.

*Semb.* a surrender by a copyholder to a disseisor, lord of a manor, *ad faciendam inde voluntatem suam* operates as an extinguishment; and a voluntary grant of the copyhold by the disseisor is void against the disseisee. A disseisor or lord may take a surrender to an use, but he cannot thereupon grant a larger estate than what was in being before.

A COPYHOLDER for life in possession; one Thornburgh was copyholder for life in reversion, according to the custom of the manor; and Corbett was lord of the manor by disseisin. Thornburgh makes a letter of attorney to surrender his estate to the lord of the manor, or his steward for the time being, *ad faciendam inde voluntatem suam*; and Corbett afterwards grants this estate surrendered by Thornburgh to J. S. for his life; afterwards the king being restored, and this manor belonging to the bishop of Worcester, Morley the bishop grants it to the defendant; and the plaintiff claims under Thornburgh that made the surrender, who was yet living.

In this case it was held clearly,

1. That a disseisor, lord of a manor, may take a surrender to use; because there he is but a conduit pipe to pass the estate through, and takes nothing by way of interest; and therefore without question if a copyholder in fee surrenders to the use of another in fee to a disseisor lord, this is very

good: and so a copyholder for life may surrender to the use of another for the life of the surrenderor, and this is good, though it be to a disseisor lord; because here is no prejudice to the rightful lord in neither of these cases: but if B. a copyholder for life, surrenders to the use of C. for the life of C. to the disseisor lord, and he grants this accordingly, this will not be good; for the disseisor cannot create any new estate from what was in being before.

1 Roll. 503. 4  
Co. 24. Com.  
Dig. Copyh. C.4.  
Hargr. Co. Lit.  
58 b. note (5).

But the question was in this case, that although a copyholder for life cannot surrender to the disseisor lord, so as to enable him to grant an estate to another for life, yet here, when the copyholder for life surrenders to the disseisor lord *ad faciendam voluntatem suam*, the question is, whether or no this shall not amount to an extinguishment of the copyholder's estate?

And the Court inclined, that a copyholder, who hath but a customary interest, might well extinguish that interest by his surrender to the lord for the time being, though he were a disseisor: for *Atkins* said, he took it for a rule, that a disseisor lord might do any act that the rightful lord might, if it did not tend to the prejudice of the rightful lord; but whatsoever acts did tend to the prejudice of the rightful lord were void; and the difference taken in Cro. Car. 205, betwixt a surrender made by a copyholder in fee and for life.

A disseisor lord  
[ \* 246 ]  
may do any act  
which the right-  
ful lord may, if  
it does not tend  
to prejudice the  
rightful lord.  
*Per Atkins, J.*  
1 Inst. 28.

But *North* seemed to incline, that if B. a copyholder for life, should surrender to a disseisor lord to the use of C. for the life of B. that this might be well enough; because that C. would be in of the old estate; but when B. surrenders to the use of C. generally, the old estate is gone upon the surrender; and if the lord grant to C. this is not the old estate, but an estate for the life of C.

14 H. 7, 4.  
*Semb.* the pos-  
session of the  
copyholder will  
not prevent the  
lord from being  
disseised. 1 Vent.  
360.  
1 Inst. 324. 4  
Co. 24. 1 Rep.  
*Chudleigh's*  
case, Moor,  
352.

But *Maynard* did object, that there could be no disseisor as to the copyhold estates, so long as the copyholders were in possession; for he said, it was *Littleton's* case, that if there be lessee for life on years, the lessor cannot be disseised of the reversion, so long as the lessees keep their possession, no not although the lessees do attorn, or pay their rents to another, and then, if there were no disseisor, as to this copyhold estate, the surrender would be void.

But *Scroggs* said, to what purpose then are all those cases put of surrenders made to, and grants made by, lords of manors by disseisin? *Adjournatur.*

And *North* said, that copyholds in manors were stiled in the ——— office by the name of demesnes (a).

(a) Although the opinion of the Court in this case is differently reported, yet Mr. Watkins is favourable to the inclination of the Court as reported by Freeman on the question of extinguishment. "The rightful lord" he says "would

be benefited and not injured by the extinguishment of the copyhold; for it would then go along with the manor and be recovered as part of it on the manor being recovered." Watk. Copyh. p. 119, 120, 2d edit.

## (C. 257 b.)

When the defendant's plea agrees in time with the declaration, he needs not traverse before and after: but the plaintiff may vary his time. *Ante*, C. 219. Carth. 281.

IN an action of trespass, &c. the defendant justifies by a licence, &c. and in his justification agrees in time with the plaintiff's declaration. He need not traverse before and after. Hob. 104. But then the plaintiff may vary his time.

## (C. 258.)

## MONKE v. BARKER.

Averment of performance of a condition precedent.

ASSUMPSIT. That if the plaintiff would build such a house *substantialiter et accommodate*, the defendant did promise to allow as much as any of the neighbouring tenants did allow their landlords, &c. and he avers, that he did build it *tam substantialiter quam* any of the neighbours built theirs, and that their allowance was a fourth part of the charge. Upon *non assumpsit* a verdict was for the plaintiff.

[ \*247 ]

\* It was moved in arrest of judgment, that the averment was defective; because it is, that it was as substantial as any of the neighbours', and perhaps none of theirs were substantial; but he ought to have averred, that he did build it *substantialiter et accommodate; et semble per Curiam q' nest bone. Sed advisare volunt.*

## (C. 259.)

## WEBSTER v. BACH.

S. C. 3 Kebl. 848.

A private way by prescription to a certain close, shall not be used for the purpose of carrying hay, which grew upon another close.

TRESPASS. The defendant justified by a prescription for a way to a certain close. The plaintiff replied, that he brought a load of hay along that way that grew upon another close. And the defendant demurred. And adjudged against him; for if a man hath a private way to a close, he shall not enlarge it to other purposes (a).

(a) A private carriage-way from A. to B. cannot be used for the purpose of going from A. to C., although B. adjoins C. and lies in the way to it. 1 Rol. 391, l. 50. *Howell v. King*, 1 Mod. 190. *Loughton v. Ward*, Lutw. 111-3. 17 Viner, 283.

## (C. 260.)

## HARWOOD v. HELYARD.

S. C. 3 Kebl. 848; and 2 Mod. 268, differently reported.

Debt on bond conditioned to give notice to obligee: plea, that defendant gave notice according to the form and effect of the condition, held bad for not shewing how he gave it. 1 Lev. 145. *Ante*, p. 38.

DEBT upon a bond. The condition was, to give notice, if he sold such land, to the obligee. The defendant pleaded, that he gave notice *secundum formam et effectum conditionis*. And it was held to be a bad plea; for he ought to shew how he gave notice, that the Court may judge, whether or no it were according to the condition; as when a man pleads a discharge. Hob. 296. Cro. Car. 19.

## MILLS v. WRIGHT.

( C. 261. )

S. C. Wells v. Wright, 2 Mod. 285.

DEBT upon a bond of 300*l.* conditioned that if he do not pay the money the bond shall be void. Plaintiff assigns the breach, that he did not pay the money. Defendant demurs. *Weston pro def'* cited 39 H. 6, 9. Chief Justice:—The other authorities are *e contra*. *Barrell* cited *e contra*, Trin. 14. Car. 2. B. R. Rot. 1786, *Thurland* in *Wren* and *Alsop* (a). Chief Justice:—If the condition were, “The condition of this obligation is such, that then this bond shall be void,” the bond were good. Cro. Car. 77. *Solvend'* to the obligor, 1 Roll. 409, that the condition is void, and the bond good, and so it shall be interpreted according to the mind of the parties, that the condition is absurd. Judgment *pro quer* (b).

A bond, with a condition that if the obligor do not pay the money, the bond shall be void, shall be construed to become void on payment of the money.

(a) S. C. *Vernon v. Alsop*, 1 Sid. 105. 1 Lev. 77.

(b) 1 Saund. 66, note (2). 2 Salk. 463. *Bache v. Proctor*, Dougl. 384.

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## MAY v. WOODWARD.

( C. 262. )

A. AND B. covenant with C. for themselves and every of them, that if they renew such a lease, they will assign the term to C. A. dies, and the covenant being broken, C. sues the executor of A.

A. and B. covenant “for themselves, and every of them” to assign a term, &c.: this is a joint and several covenant, and the survivor or executor of the deceased may be sued.

*Obj.* That this is a joint covenant, and so ought to survive in charge to B. *Cur'*—It is joint and several, “for every of them” is as much as “for each of them,” and so the party hath election to sue either the executor or the survivor. 5 Co. 19. *Jud' pro quer'*. *Rosse's case*, Bulst. 2 Brownl.

## BRITTANE v. CHARNOCK.

( C. 263. )

S. C. 2 Mod. 286.

DEBT against an heir, who pleads *Riens per descent*.

Upon a special verdict the jury find, that Charnock did devise lands to his eldest son, within four years after his death, paying to his daughter 20*l.* Two questions were made:

A. devises lands to his heir “within 4 years after his death, paying to his daughter 20*l.*” *Semb.* the land shall go to the executors for the 4 years, and the heir takes by purchase and not by descent.

1. Whither these lands should go during the first four years? and for that the Court seemed to incline, that they should go to his executors. [*Vid.* 2 Mod. 286.]

2. Whether the heir should have these lands by descent, or by devise as a purchaser? and for this point the Court inclined, that the heir was not in by descent, but as a purchaser; because the estate was clogged with the payment of the 20*l.* Cro. Car. 161 (a).

But they seemed to take this rule, that wheresoever the

(a) Acc. *Pybus v. Mitford*, post, p. 372. But the law is otherwise now, and *Gilpin's case* (Cro. Car. 161) has been overruled. *Clarks v. Smith*, 1 Salk. 241. *Chaplin v. Leveux*, 5 Maul. & Sel.

14. *Langley v. Sneyd*, 3 Brod. & Bing. 243. And with respect to what shall be assets by descent, see, generally, Serjeant Williams's note to *Jefferson v. Morton*, 2 Saund. 8 & Harg. Co. Lit. 12 b. n. (2).



of the Lord *Paget's* case, Moor, 194. 1 Co. 154. 1 Leon. 194; no use did rise there, because the consideration of payment of his debts was executory, and was no present consideration. *Vide* Cro. Eliz. 378. 6 Co. 15.

3. The consideration of a pepper-corn is of no value to raise an use; and therefore if an infant make a lease, rendering a pepper-corn, it is a void lease. 43 Ed. 3. Fitz. Entr. 26.

But as to this point all the Court, except *North*, C. J., did incline, that this lease did operate by the statute.

2 Inst. 672.

For, as to the first objection, they said, it had been often adjudged, that, though there were not the words "bargain and sell," yet it would operate by way of use, there being a sufficient consideration. 8 Co. 93.

[ \*251 ]

*Ante*, p. 58.

2. As to the second objection, they held, that though this rent was to be paid futurely, yet it was a present duty; and the obligation to pay it was present, for "yielding and paying" makes a covenant. And *North* said, that where \*things are done in the same instant, they would transpose them, and suppose a precedence, it being to support common assurances; and so they might suppose the covenant to pay the rent to precede the raising of the use, and then the consideration would be executed.

A lease and release may be in the same deed, and priority of the lease is presumed.

The value of the consideration to raise an use, is not material. 2 Fonbl. Tr. of Eq. p. 29. 2 Atk. 148.

Lease of infant, with a pepper corn rent, is void.

Co. Lit. 49 a. and Hawk. Abr. *ibid.* 6 East, 105.

(1) *S. C.* Cart. 187. *Post*, p. 368-9, 470.

And *North* said, he had known it ruled several times, that a lease and release in the same deed was a good conveyance, for priority should be supposed (a).

3. As to the third they all held, that the value of the consideration was not material; for it is usual, if an estate be of the value of 1000*l.* *per annum*, to make 5*s.* the consideration in a bargain and sale for a year; and by *Porter's* case, 1 Co. 24, a penny is sufficient to alter the use of a feoffment, and to cause the feoffee to be seised to his own use; and so in the case of *Sutton's Hospital*, 10 Co. 34.

And as to the lease of an infant, reserving a pepper-corn, that shall be a void lease, because it appears to the Court, that there is no proportionable consideration (b).

And *North* said, that if there had appeared any intent of the parties; that it should operate by way of use, he should not have doubted of the case, but the intent ought to appear; and he said, in the case of *Garnish v. Wentworth* (1), tried before the Lord Chief Justice *Bridgman*, a conveyance was endeavoured to be set up by a covenant to stand seised, by reason that the party was related to him that made it, though it were nine degrees off; and *Bridgman* said in that case, it were worthy of consideration, whether the use should rise, because the party that made it did not know of the relation, and so could not intend it. But that point was not determined, because upon examination it appeared, that there was no relation in the case.

(a) And probably the conveyance would be supported, although the release were in fact executed before the lease, and the latter were made to hold from the day of the date. See 2 Prest. Convey. p. 663-4, 386-7.

(b) But see *Zouch v. Parsons*, 3 Burr. 1806, and the authorities collected in Bac. Ab. Leases, (B). 2 Prest. Convey. 249. Watkins. Conv. 163, 4th edit. *Ante*, p. 139, 140.



And in the case of *Rigby and Smith*, Cro. Car. 529, though the express consideration be natural love to his children, yet the party being his brother, to whom the conveyance was made, and part of the consideration being to settle his lands in his blood, though that particular relation was not named, it was well enough, because it seemed to be pointed at. *Vide* 7 Co. 39.

And they said, that the very tenure was sufficient to change an use, or at least to keep it from resulting; and therefore, if a lease be made without consideration, or reservation of rent, the use shall not result, as it shall in case of a feoffment, because there is no tenure.

Tenure alone is a sufficient consideration to keep an use from resulting. Bro. Feoff. al. Use, pl. 10. Perk. § 534-5-6.

And *Wyndham* said, that although it might not be a consideration to raise an use of a freehold, where the deed is \* to be enrolled, because by the statute it is to be a valuable consideration, yet it might serve in case of a lease for years (c).

[ \* 252 ]

And whereas it was objected, that it ought to be money for the consideration, it was said, though it should not pass by bargain and sale, yet the use might rise by a covenant to stand seised well enough.

Post, p. 368.

And *North* said, that if the truth of this case had been found, there would have been no question in it; for this recovery was to support a mortgage, though it was not so found, and that would have been a sufficient consideration.

Post, p. 344.

And *North* said, that this conveyance by lease and release was first invented by Sir Francis More, for formerly they used to make a lease, and the lessee used to go and enter, and the same day they made the release.

2 Bl. Com. 369.

Another point was stirred, viz. that in case there were no good tenant to the *Præcipe*, yet he in remainder being heir to the tenant in tail, should be estopped, according to the opinion of Plow. *Manxell's* case; but that opinion of Plow. was denied by the Court, according to 3 Co. 6; for if that were law, then there need never be any lawful tenant to the *Præcipe*, which the law requires; because by the judgment the tenant is to be turned out of possession; and though all are estopped that claim under the parties to the recovery, yet the issue in tail and the remainder are not, because they claim paramount from the donor (d).

A recovery by tenant in tail, without a good tenant to the *Præcipe*, will estop all who claim under the parties; but not the issue in tail or remaindermen.

Another point was, here being a special conclusion (1) made, whether the Judges should be bound by this special conclusion of the verdict; for it was held in the case of *Lane v. Cooper*, Moor's reports, that they should not; but it is said, and so held, that since that the law had been held contrary. 5 Co. 95. 2 Roll. 701.

(1) See the Rep. in 1 & 2 Mod.

Whether the Court be bound by the special conclusion of a verdict? Com. Dig. Pleader, S. 35. 1 Salk. 249.

(c) "Although the creation of a particular estate, or of a tenure, implies a consideration, and will prevent an use from resulting by application of law; yet a mere bargain and sale for a year, or any other particular estate, will not raise or create an use, in the absence of a con-

sideration in money or money's worth." 2 Prest. Conv. p. 374.

(d) On the effect of a recovery as an estoppel, see Pigott, p. 31-7. 1 Prest. Conv. p. 87-9. *Doe v. Bishop of Landaff*, 2 New Rep. 504.

## ( C. 267. ) ABBOT v. RUGESLEY. Trin. 29 Car. 2. Rot. 1691.

S. C. 2 Mod. 307.

When the plaintiff demurs to a plea *puis darrein cont.* and the defendant, being ruled to join in demurrer, refuses to do so; the plaintiff may enter up judgment.

[ \* 253 ]

Bull. Ni. Pri. 311.

A plea *puis darrein*, &c. offered at *Nisi Prius*,

must be proved there, otherwise the judge may refuse to allow it. Bull. 309.

1 Stra. 493.

When the plea is found against the defendant, on demurrer it is peremptory.

Bull. 310.

The plaintiff cannot reply to it before the

judge of *Ni. Pri.* Bull. 309. 2 Mod. 307. The plea is not amendable except during the assizes before the judge of *Ni. Pri.* Bull. 309. *Sed vid. Hartley v. Dixon*, 2 Smith Rep. 659.

ISSUE being joined upon not guilty in battery at the assizes at Huntingdon, the defendant pleaded an accord without alleging satisfaction; to which the plaintiff demurred; and the plea being certified upon the back of the *Postea*, the plaintiff gave the defendant a rule to join in demurrer; but the defendant refusing, the plaintiff entered judgment, and took the defendant in execution.

\* And it being moved by Serjt. Seise to set aside the judgment as obtained irregularly; the Court held,

1. That the defendant refusing to join in demurrer, the plaintiff might lawfully enter up his judgment.

2. That he that offers a plea *puis darrein continuance*, at the *Nisi Prius*, ought to prove it there; for unless he make it appear to the Judge that it is a true plea, it is in his discretion whether he will allow it or not, but may proceed to try the cause (a).

3. That if the plea be found against the pleader, it is peremptory.

4. That the plaintiff cannot reply to it before the Judge of *Nisi Prius*.

5. That the plea could not be amended here, but might; during the assizes, be amended before the judge of *Nisi Prius*. *Vide* 2 Cro. 261. Yelv. 180.

(a) The judge is bound to receive the plea, when verified on oath. 2 Wils. 137. 3 Term Rep. 554. 1 Marsh. 70. 5 Taunt. 333. 1 Stark. 62.

## ( C. 268. )

Semb. S. C. Ballard v. Oddey, 2 Mod. 307.

A bond for the payment of legal interest is not void, because the obligee afterwards takes more; but he is liable to an information.

Where an agreement is made usurious by the mistake of the scrivener, it is not void.

It was said by North, Chief Justice, that, if a man takes a bond legally for the payment of lawful interest, but afterwards he doth actually take more than the legal interest, this doth not avoid the bond; but the party is liable to an information upon the statute for taking more than the statute allows (a). And it was likewise held, that if a scrivener, in making a mortgage, &c, do, through mistake, make the money payable sooner than it ought to be, or reserve more interest than ought to be, this will not make it void within the statute, because here was no corrupt agreement. [2 Rol. Rep. 398] (b).

(a) Acc. 4 Burr. 2253. Dougl. 237. 3 Wils. 261. 3 Term Rep. 538-9, and other cases cited in note (1) to *Ferral v. Shaen*, 1 Saund. 294.

(b) Acc. Cro. Car. 501, and *Bush v. Buckingham*, 2 Vent. 82, 83. *Booth v. Cooke*, post, p. 264, and cases cited in 22 Viner, 298.

## ( C. 269. )

FLOYD'S CASE.

Vid. ante, p. 224.

When a *habeas corpus* is grant-

SERJEANT Seise moved for a *habeas corpus* for Floyd.

It was held by North, Chief Justice, that if it were a *habeas*

*corpus ad faciendum et recipiendum*, (which is, when an action is entered here against the party, and is to bring him up hither to answer it), then he might have it without motion. able by the Common Pleas. 2 Mod. 306.

But if it were a *habeas corpus ad subjiciendum*, (viz. when a party is committed for a criminal matter, and desires to come to his trial), there this Court cannot grant it, because they have no cognisance of criminal matters. Vid. 2 Rol. 307.

And he said, that a *habeas corpus ad faciendum et recipiendum*, when the party is in prison, is the same thing as \* a *ca-pias* is when the party is at large; for it is only to bring him to answer to that action. [\* 254]

But *Atkins* said, that this Court might grant a *habeas corpus ad subjiciendum*; and so the Court differed; and precedents were ordered to be searched.

SIR CLEMENT CLERKE v. CHILD OF NORTHWICH.

( C. 270. )

THE defendant sold the plaintiff a parcel of wood, called the Ally Binde in Shrawley woods; and the defendant covenanted, that if the said wood did not upon measure amount unto forty acres, then he would make it up forty acres out of the woods next adjoining; and the plaintiff covenanted, that if it were more than forty acres, he would pay him 12*l.* per acre for every acre above forty. The defendant sold a parcel of wood to the plaintiff, and covenanted that "if the said wood did not, upon measure, amount unto 40 acres, he would make it up out of adjoining woods." The plaintiff declares on the covenant, and alleges that the parcel "did not, upon measure, amount unto 40 acres:" held, that notice thereof to the defendant is unnecessary.

The plaintiff alleged for breach, that the said parcel of wood did not upon measure amount unto forty acres; and that he gave notice thereof to the defendant, but the defendant did not make them up.

The defendant pleaded, that the plaintiff did not give him any notice, &c.

The plaintiff demurred.

The question in this case was, whether or no notice was requisite?

And the Court was of opinion, that notice in this case was not necessary; because the defendant had taken upon him by his covenant to make it up, and he might have measured as well as the plaintiff.

And *per Baldwin*.—Whenever the defendant may, by any apparent means, come to the knowledge of the thing, there no notice is requisite; or if it be a thing that the defendant may as well come to the knowledge of as the plaintiff, there no notice is requisite; but if it be a thing that lies particularly in the knowledge of the plaintiff, there notice ought to be given; as if I give a bond to pay so much to A. when he cometh into Somersetshire, there A. ought to give notice, because he may come in the night, or so as it is impossible for me to know it; but otherwise it is, if it be when a stranger cometh into Somersetshire, for there I may take notice as well as he. Vid. ante, C. 152. Post, C. 285. 5 Viner, 270. 2 Saund. 62 a, note (4). 5 Term Rep. 621-4.

## DE TERM S. TRINITATIS, 1678.

IN COMMUNI BANCO.

( C. 271. )

DRAKE v. RANDALL.

S. C. 2 Mod. 308.

When an executor pleads a judgment, not merely erroneous, but void, (as a recovery in an impossible term), the plea is bad.

An administrator pleads a judgment recovered by himself against the intestate; *quare*, whether the plaintiff can avoid it, by shewing that the judgment was entered after the testator's death?

[ \* 256 ]  
1 Roll. 742.

Vaugh. 95.

AN action was brought against the defendant as administrator, for a debt due from the intestate by contract.

The defendant pleads, that in Hilary Term *vicesimo sexto et septimo nunc Regis* he sued the intestate, and in Easter Term *vicesimo septimo* had judgment against him.

The plaintiff replied, that before Easter Term *vicesimo septimo* the intestate died, and that the defendant entered up the judgment after he was dead, and kept it on foot *per fraudem et covinam*.

The defendant rejoins, and traverses the fraud and covin.

It was urged for the plaintiff, that here was special matter alleged, which was fraud apparent, so that the Court might judge of it, viz. the entering of the judgment against a dead man, and the defendant ought to have answered that special matter (a).

On the other side it was alleged, that here was a judgment pleaded, and the replication of the plaintiff did but shew that it was erroneous; and if so, it ought to be reversed by error, and should not be avoided by plea.

But the plaintiff insisted, that in this case no person could bring a writ of error but the defendant himself; and \* that he would never do, being to take advantage of it, and so the plaintiff should be without remedy.

But to that the Court answered, that an executor or administrator may in many cases suffer a judgment, where he might have avoided it, and yet the creditors without remedy; as if debt upon a simple contract be brought against an administrator or executor, and he suffer judgment against him, this judgment may be pleaded to other creditors; and that hath been so ruled in the King's Bench, which was admitted by *Pemberton*.

But here the defendant having pleaded his action commenced in Hilary Term 26 & 7, (whereas it should have been 26 & 27,) and there was no such term, and so it was a void judgment; and so the plaintiff might take advantage of it by plea. Judgment was given *pro quer' nisi* (b).

(a) That the rejoinder traversing the fraud was proper, see Sir W. Jo. 92. 1 Ld. Ray. 678. Lutw. 1637. *Trethewy v. Ackland*, 2 Saund. 50, and note (8), *ibid*.

(b) In 2 Mod. the judgment seems to have been held void, not for the reason here stated, but because it was entered after the intestate's death; and the case

is so cited in Com. Dig. Pleader, 2 D. 9. See 1 Bulstr. 5. *Weston v. James*, 1 Salk. 42. *Smith v. Harmon*, 6 Mod. 144. *Burnet v. Holden*, 1 Lev. 278. Stat. 17 Car. 2, c. 8. That a judgment merely erroneous is pleadable by executor, if not fraudulent, see *Williams v. Fowler*, 1 Stra. 407, 410.

## THE KING v. THE BISHOP OF ELY.

( C. 272. )

DR. SPENCER, who was one of the prebends of Ely, was made dean by the king, so that the prebend was avoided by cession.

A prebendary of Ely is made dean by the king: shall the king or the bishop present to the prebend?

The question was, who should present to the prebend, the king or the bishop, to whom it did belong, if this cession had not intitled the king?

*Weston pro def'* cited these authorities, Bro. Tit. Presentment, 61. 4 Co. *Holland's* case. Rolle, Presentment, 343. 41 Ed. 3, 5. 46 Ed. 3, 32. Noy, 138. Ow. 144. Cro. *Hal-land's* case. Jones's Rep. *Child v. Baylis*. Fitz. *Quare impe-*dit, 35.

Serjeant *Pemberton pour le Roy*: Co. Ent. 434 or 474. Dr. *Reeve's* case, Vaugh. Rep. 118. *Glover's* case, *q' ne fuit innovation, mes prerogative al common ley*. 11 H. 4, 37. Rolle, Presentment, 343. Vaugh. Rep. Dr. *Yeedy's* case, Cro. Eliz. 790. 11 H. 4, 60. Noy, 138. Dy. 226. 11 H. 4, 66. Moor, 399.

The Judges seemed to incline for the king, but it was adjourned for farther argument.

## CECILL v. DARKIN.

( C. 273. )

A MAN dieth in France, and hath goods in the diocese of Norwich; and the question was, whether the bishop of Norwich should grant administration, or the archbishop?

A man dies in France, leaving goods in the diocese of Norwich: the bishop of N. shall grant administration. See ante, p. 102, C. 117. 3 Kebl. 163.

*Per North*, C. J.—The bishop of Norwich shall grant administration, unless he hath *bona notabilia*; and his dying in France is no more than if he had died in Norwich.

## DE TERM. S. MICHAELIS, 1678.

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## IN COMMUNI BANCO.

## BROOKES v. HAYES.

( C. 274. )

S. C. T. Raym. 245. 3 Salk. 19.

AN action of the case was brought by the plaintiff, being an attorney, for money laid out for the defendant, and for his fees.

To an action of *assumpsit* for attorney's fees, the defendant may plead in bar the stat. 3 Jac. 1, c. 7, and that the plaintiff has given him no bill. *Vid.* 2 Geo. 2, c. 23. 1 Show. 48, 338. 1 Salk. 86. Bull. N. P. 145.

The defendant pleaded in bar the statute of 3 Jac. and that the plaintiff had given him no bill. And the plaintiff demurred.

But, *per Cur'*,—It is a good plea; and he having declared specially, and it appearing in his declaration that his action was for fees and money laid out in soliciting, it was very proper to plead it; and if he had brought a general *indebitat'*, then the statute might have been given in evidence at the trial; because there it could not be pleaded, it not appearing in the declaration for what the action was brought.

Another exception was taken to the plea, because it was pleaded in bar; and not in abatement; but that was held well enough.

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## DE TERM S. HILARII, 1678.

IN COMMUNI BANCO.

( C. 275. )

## CARTRIGHT'S CASE.

An intestate died, leaving four grandchildren, of whom one only was of age; administration was granted to the mother and guardian of the other three *durante minori ætate* in preference to the one of age.

Sir T. Jo. 162.

1 Phillim. 123.

2 Phillim. 115.

MR. CARTRIGHT of Aynoe in the county of Northampton died intestate, leaving four grandchildren, whereof one was at age, and the other three were minors; and the administration was contested betwixt her that was at age and the mother and guardian of the other three; and this case was argued at Serjeants Inn before the two Chief Justices and the Chief Baron *et al*, who granted it to the mother as guardian to the three *durante minore ætate*; though it was strongly urged, that she that was at age being capable, and the others incapable, she ought to be preferred.

But on the other side it was urged, that since the new statute [22 & 23 Car. 2, c. 10,] which intitled them all to a distribution, the interest of the three did preponderate, and therefore that was to be regarded; and they compared it to the case of a residuary legatee, who shall be preferred before the next of kin (a).

(a) *Young v. Peirce*, post, p. 496. *Thomas v. Butler*, 1 Ventr. 217. *Atkinson v. Barnard*, 2 Phillim. Rep. 316. 4 Burn's

Ec. Law, p. 280, (8th edit.). *R. v. Bettesworth*, 2 Stra. 1111-2.

( C. 276. )

## PAYDON v. HARDY.

Semb. S. C. Skin. 2. 1 Ventr. 357.

Tenant in tail, with remainders over, makes a

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lease for life, and then leases the reversion for

years: held that

the lease for life

[not being war-

ranted by the

statute] is a dis-

continuance

during the estate

for life, and the

lease for years

operates out of

the tortious fee

gained thereby:

that on surren-

der by tenant

for life upon

condition, the

continuance

TENANT in tail, with remainders over, makes a lease *per auter vie* with livery, rendering rent, and then makes a lease for years of the reversion; tenant *per auter vie* surrenders to the lessor upon condition; the lessor suffers a recovery; the condition being broken, the lessee re-enters; the lessee for years distrains for the rent.

In this case it was held, that this lease for life did make a discontinuance of that estate tail and remainders during the continuance of the estate for life, during which time the tenant in tail had a tortious fee-simple, out of which the lease for years did operate; then when the tenant *pur auter vie* surrenders, the discontinuance vanishes, and the estate tail is restored; but the surrender being but upon condition, when the tenant for life enters for the condition broken, the discontinuance is revived.

A question was made in this case about the pleading, because the grantee of the reversion for years, to intitle himself to the rent, in pleading his grant did recite the words of it,



viz. "That the lessor did grant, bargain, sell, release and confirm," to which grant the tenant did attorn. To this the defendant demurred, and for cause shewed specially, that the pleading was double.

But here the Court resolved, that it was not double; for though there were multiplicity of words, yet there was no duplicity of pleading; because the avowant had election which way he would take it; and he had sufficiently limited it, by alleging the attornment, that he did claim it by grant (a).

And it was said, that double pleading is good upon a general demurrer; because it is too good, when the defendant alleges two bars to the plaintiff's action; but if it be shewed specially for cause, it is naught; because the party ought to be ascertained which to make answer unto, and the Court should not be inveigled. And *double pleading* is properly when the defendant pleads two pleas, either whereof is a sufficient bar to the plaintiff's action.

A *repugnant plea* is when one part contradicts the other; as to plead a title by the common law and by the statute of uses, it can pass but by one; and this is naught upon a general demurrer.

*Insufficient pleading* is when there is good matter, but it is not so alleged as the Court can judge of it; as to plead, that such a one conveyed it, and not set forth by what conveyance, and this is naught.

(a) On the propriety of insisting upon some one operative word of conveyance, see *Monnington v. William*, 1 Vent. 109. *Baker v. Lade*, 3 Lev. 291. 4 Mod. 149. *Challoner v. Davies*, 1 Ld. Raym. 400, 404. 1 Lutw. 570. 2 Saund. 97 b, note (2), by Serjeant Williams. Com. Dig. Pleader, C. 37. And see further on pleading conveyances, &c. in the very

words, or according to their legal effect, *Moore v. Earl of Plymouth*, 3 Barn. & Ald. 66-9, 70. *Marsh v. Bulleel*, 5 Barn. & Ald. 507, 511. *Kearney v. King*, 1 Chit. Rep. 28. S. C. 2 Barn. & Ald. 301. *Ross v. Parker*, 2 Dow. & Ryl. 662. 1 Barn. & Cress. 358. *Whiteman v. King*, 2 Hen. Black. 4, 11.

vanishes, and the estate tail is restored; but on re-entry by tenant for life for condition broken, the discontinuance is revived. Litt. s. 620, 636. Co. Lit. 333 a. 337 b. When many words of conveyance are used, the alienee may elect which way he will take, and in pleading may recite all of them without duplicity, if he sufficiently shews upon which he relies. *Ante*, p. 127. Harg. Co. Lit. 49 a. note 1. Co. Lit. 301 b. Double pleading is good on general demurrer. 1 Saund. 337. 1 Wils. 219.

## DE TERM. S. TRINITATIS, 1679.

IN COMMUNI BANCO.

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### MERRITT'S CASE OF WINCHCOMBE.

( C. 277. )

AN action of debt for rent was brought in London, and the lands lay in Gloucestershire; the action betwixt the lessor and lessee was grounded upon the contract; upon affidavit made, that the defendant would plead a special plea, whereby the title of the estate would come in question, the Court ordered the venue to be changed into Gloucestershire.

The venue changed in an action of debt for rent between the lessor and lessee. 2 Stra. 878. 1 Burnard, K. B. 379.

( C. 278. )

SERJEANT TURNER moved to change the venue in an action of escape: but was denied *per Cur'*; for an escape in one county is an escape all over England.

And *per Robinson*, prothonotary, the Court rarely changes the venue but in an action of the Case.

Venue not changed in an action for an escape. Barn. 491, 493. 2 Salk. 670. 2 Marshall, 152.

( C. 279. )

STAINTON v. RANDAL.

S. C. *post*, p. 266.

A plea in trespass, justifying under the process of an Hundred court, must allege that the cause of action arose within its jurisdiction.

TRESPASS for taking his goods. The defendant pleads, that process issued out of an Hundred-court, to seize the goods for not appearing.

And the plaintiff demurred; because it was not alleged, that the cause of action did arise within the jurisdiction of the Court; and the demurrer held good (a).

(a) Contra, *Gwynne v. Pool*, Lutw. 935, 1658. *Truscott v. Carpenter*, 1 Ld. Raym. 229. The cases warrant a distinction between the officer of the inferior court, and a party to the suit there: in the latter case the allegation is necessary, but not in the former. *Moravia v. Sloper*, Willes, 30. *Evans v. Munkley*, 4 Taunt. 48. *Squib v. Holt*, ante, p. 193, *Endike v. Steed*, *post*, p. 294. *Weld v. Wiggett*,

*post*, p. 320. *Higginson v. Martin*, *post*, p. 322. S. C. Bull. Ni. Pri. 83. And see *Rowland v. Veale*, Cowp. 18. *Murray v. Wilson*, Say. 17. *Belk v. Broadbent*, 3 Term Rep. 185. *R. v. Danser*, 6 Term Rep. 245. *Goodwin v. Gibbons*, 4 Burr. 2109. 1 Saund. 74 a, note (1), and 92, note (2). *Briscoe v. Stephens*, 2 Bing. 213.

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( C. 280. )

HULY v. SADLER.

In ejectment defendant pleaded *ancient demesne*; replication "that a fine was levied" held bad.

EJECTMENT d' un manor. Le defendant pleade q' est auncient demesne. Le plaintiff reply q' un fine fuit levy; et jud' pur le defendant, quia le replication est male. Sed quære de cest case (a).

EJECTMENT of a manor. The defendant pleads that it is ancient demesne. The plaintiff replies that a fine was levied; and judgment for the defendant, because the replication is bad. But *quære* of this case.

(a) See entries of such a replication in *Robinson Ent.* 250. *Brownlow Rediviv.* 504. *Liber Placitandi*, 347. *Herne*, 351. That a fine levied in the King's Courts makes the land frank-fee until reversed, see 4 Inst. 269, 270. 1 Rol. Ab. 324.

*Semble*, the plea here is bad, because the manor itself and its demesnes are impleadable at common law, and not in the Court of ancient demesne. *Baker v. Wick*, 1 Salk. 56, 779. Com. Dig. Anc. Demesne, B. F. 6.

( C. 281. )

FISHER v. MARSON.

Variance between bond and declaration. *Post*, C. 456, 570.

DEBT upon a bond for 16*l*. Upon oyer of the bond it was in *decimo sexto libris*; and the defendant demurred for the variance: but *per Cur'*,—It is good enough. Judgment *pro quer'*. Yelv. 95. Hob. Rep.

( C. 282. )

GARTH v. TAYLOR.

S. C. better reported, 2 Bac. Ab. 388-9, 5th edit.

A stranger enters upon land, of which an intestate was lessee, and feeds the intestate's cattle with the hay which grew upon it: administration is afterwards granted to him with

DEBT against an executor for rent incurred in his own time. Upon a special verdict they find the lease and the descent of the reversion to the plaintiff; and that the defendant, after the death of the lessee, did feed his cattle with the hay that grew upon the land. Administration was granted to the defendant, with an exception of this term.

The question was, whether the defendant here could waive the term after he had entered; administration was taken after the rent grew due.

**Serjeant Shipwith:**—He cannot wave, without shewing that the rent was more than the value of the lease. 18 H. 6, 1. Bro. Waver, 10. Style, 67, 119. 2 Rolle, 271. 2 Cro. 204.

**Borrell e contra:**—A rightful executor cannot wave a term, but he shall be charged in the *Detinet* only. *Hekyer's case*, Yelv. 109. And here a friend enters and feeds the cattle from February to the 23d of March, and administration is taken in April after; so that here he enters for a special purpose, and not generally as an executor; a lawful executor is an assignee, and chargeable by reason of the possession. *Cole v. Johnson*. He admitted, that as to goods he shall be chargeable as executor *de son tort*, and liable in the *Detinet* only; but here he is charged in the *Debet* and *Detinet*, and his title did afterwards commence lawfully in April. (Note, That the rent-day was incurred before administration committed).

\* **Chief Justice:**—If a man die intestate, and another is executor *de son tort*, he shall be charged for the rent till he is evicted by the administrator.

**Windham and Atkins** of the same opinion, that here he hath entered as executor, keeping the cattle five weeks upon the farm; and here is no gift to purge this wrong.

**Ellis:**—*Debet et Detinet* is good against the executor *de son tort*.

1. *Il ne poet waive si soit executor, et est assigne et doit prender cum onere (a).*

2. *Nest trouve q' il waive the possession.*

3. *Q. Si poet estre executor de son tort de un term.* If he enters, and meddles not with the testator's goods, he is a disseisor; but if he meddles as executor, he alone gains the term. Sty. 407 (b). *Jud' pro quer'.*

(a) On the waiver of terms by an executor, see *ante*, p. 171-2, and *Boulton v. Canon*, *post*, p. 336, 393.

(b) See the observations in 2 Preston's Conveyancing, p. 317—327, where it is contended that although when there is no particular estate *in esse*, or the entry of a wrong doer is general, and uncon-

particular estate, there will be a disseisin of the fee simple; yet in cases where there is a term or other particular estate in existence and a stranger enters claiming that alone, he thereby becomes a tenant for that estate alone, without acquiring a tortious fee or committing any further wrong. See 2 Thomas's Co. Lit. 505 n.

an exception of the term: held, that he is chargeable as executor in the *debet* and *detinet* for rent incurred in his own time and before administration granted. *Ante*, p. 172.

*Post*, p. 336, 393. There may be an executor *de son tort* of a term. *Ante*, p. 218. 3 Lev. 35. 3 Mod. 90. Carth. 166. 2 Bac. Ab. 388-9, 5th edit. If a

[ \* 262 ] stranger enters on land generally, of which the deceased was lessee, and meddles not with his goods, he is a disseisor; but if he meddles as executor, he only gains the term. 3 Lev. 35. 3 Mod. 90. Bac. Ab. *ubi supra*.

## DE TERM. S. MICHAELIS, 1679.

IN COMMUNI BANCO.

PHILLIPS v. LEE.

THE question was, whether rent due upon a lease parol, paid by an executor, should be a good discharge to him against an obligation of the testator's?

It was objected that debts by specialty are of a higher nature than debts without specialty; and therefore the executor having paid this rent, which was not due by specialty,

Rent due on a parol lease is of as high a nature as a bond debt. *Post*, p. 512.

[ \* 263 ] 1 Vern. 490.

3 Lev. 267.  
2 Vent. 184.  
1 Ld. Ray. 515.  
Comyn Rep. 67,  
145. Barn. 290.  
Buller Ni. Pri.  
182. 11 Vin. 289.  
And payment of  
it may be shewn  
against a bond  
creditor upon  
*plene adminis-*  
*travit.*

had paid it in his own wrong, so long as there were debts owing upon specialty.

But the whole Court were of opinion that it was well enough; and that rent, though it be upon a lease parol, is of as high a nature as an obligation; and 11 H. 4, it was held, that an obligation taken for rent did not extinguish the rent, and the Chief Justice said he had advised with Serjeant *Maynard*, who told him that it was always held so in the Western Circuit, and allowed to be given in evidence upon *Fully administered* (a); and so judgment was given *pro def*.

(a) 3 Burr. 1380. 5 Term Rep. 386.

(C. 284.)

TALMARSH v. ZINZAY.

S. C. affirmed on error, T. Ray. 402. 2 Show. 130. Pollexf. 561. T. Jo. 142.

Under a custom for a copyholder for life to destroy remainders by surrender, he cannot destroy them by fine.  
1 Wils. 26.  
7 Taunt. 674.

A CUSTOM was found in a manor, that where an estate was granted to A. for life, remainder to B. for life, remainder to C. for life, that A. had power to destroy the remainders by surrendering the estate in court, &c.

And it was found that A. granted it away by fine.

And it was held *per Curiam*, that the remainders were not destroyed, nor granted by the fine; for this being a custom against common right, that one man should destroy the right of another, it ought to be pursued strictly; and the custom being found to do it by surrender, a fine shall not have that operation within the custom.

(C. 285.)

ROWLEY v. DAD.

A stakeholder must take notice at his peril, who wins the wager.  
*Ante*, p. 254.

THE plaintiff and one Austin were in discourse about two men being hanged for cutting a maid's face; and thereupon they put 5*l.* a-piece into the defendant's hands, and if two men were hanged for cutting a maid's face, and nothing else, then the defendant was to deliver the 10*l.* to the plaintiff; and if they were not, then the defendant was to deliver the 10*l.* to Austin; and the plaintiff averred that two men were hanged for cutting a maid's face, and nothing else (a).

And upon a special verdict it was found that A. and B. were attainted for cutting the face of D. &c. and were executed.

Serjt. *Weston pro def*—That the indictment of A. and B. is found to be, that they set upon D. *vi et armis et per insidias*, \* which is the thing that makes it felony within the act (1); and so it was not for cutting her face only.

2. He objected, that the defendant being a person who was only intrusted to keep stakes, the plaintiff ought to have given him notice.

To the first objection it was answered *per Curiam*, that *vi et armis et per insidias* are but the manner of doing it; but the fact, for which they were hanged, was cutting the maid's face.

To the second they held, that the defendant was to take

(a) The winner may bring *indebitatus* stake-holder. *Walker v. Walker*, 5 Mod. 13. *Anonymous*, 12 Mod. 81.  
for money had and received against the

[ \* 264 ]

(1) 22 & 23  
Car. 2, c. 1?

notice at his peril; for the plaintiff could give him no other notice than by affirming it, which he did at the time of laying the wager: and therefore, *per North*, Chief Justice, it is a dangerous office to keep stakes; for the party must take notice at his peril who it is that wins the wager.

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BOOTH v. COOKE.

( C. 286. )

DEBT upon a bond. The defendant pleads the statute 12 Car. 2, of usury, and says, that *corrupte agreeatum fuit* that he should pay more than 6 *per cent*. The plaintiff replies, *Quod non corrupte agreeatum fuit*, and held a good replication; for if by the mistake of the writer the money was made payable without any corrupt agreement, it is not usurious within the statute (a).

To a plea of stat. Usury, plaintiff may reply *quod non corrupte agreeatum fuit*. Com. Dig. Pleader, 2 W. 23.

(a) Acc. ante, C. 268, p. 253, and note (b), *ibid*.

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COTTON v. COTTON.

( C. 287. )

S. C. 2 Chan. Rep. 138. 2 Vern. 209.

A. BEING seised of several lands in D. makes his will, and devises his lands in D. and all other his lands and tenements whatsoever, unto his wife, and after purchases other lands; and then discoursing with B., B. desired him to let him have those new purchased lands at the rate that he bought them; and he answered *No, for that he had made his will and settled his estate, and intended that his wife should have his whole estate*.

What words shall amount to a republication of a devise. Ambl. 494. Post, p. 292, 477.

The question was, whether this should amount to a new publication of his will, so as to pass the new purchased lands?

'Twas argued by Serjeant *Maynard*, that it should not, because it is not averred that he spoke those words *animo testandi*: and he cited a case 1 Rolle, 618, where a man names a new executor in his will, and yet it was held \*that this did not amount to a new publication as to the devise of lands; and he cited 2 Cro. 215. Cro. Eliz. 422, 493. Moor, 353, 404.

[ \* 265 ]

But the Court inclined strongly that this was a new publication, and applied particularly to the lands; and it is no matter for alleging *quod dixit animo testandi*, for that must necessarily be intended when the discourse hath particular reference to the will; and they said that the case in 1 Rolle, 618, of a new executor made, was not resolved; but in the book it is entered with a *Dubitatur* (a).

(a) But a parol republication is insufficient since the statute of frauds. Com. Rep. 381-5. 1 Saund. 277 d, note by Serjt. Williams.

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WHITEHEAD v. SAMPSON.

( C. 288. )

EXECUTOR of his own wrong pleads *plene administravit*, and then takes letters of administration; and then *puis darrein continuance* pleads detainer to satisfy a debt of a higher nature due to himself.

If executor *de son tort* takes out administration after suit

and before plea, he may plead a retainer to satisfy his own debt: but not if he takes out administration after plea. *Per Ellis, J.*

**Ellis, Justice.**—If he had taken administration after the suit begun, and before the plea pleaded, he might have pleaded a detainer, but not if he takes administration after he hath pleaded. Sty. 337. 1 Rolle, 923 (a).

(a) *Post, Watson v. Harrison*, p. 533. *Ante*, p. 152, 261. And see further, *Vaughan v. Browne*, 2 Stra. 1106. *Curtis v. Vernon*, 3 Term Rep. 587. 2 H.

Black. 18. 2 Bac. Ab. 391, 5th edit. tit. Executors, B. 3. *Picard v. Brown*, 6 Term Rep. 550-1. Fulbeck's Preparat. 52 a.

( C.289. )

CHAMBLETT v. WRIGHT.

A writing shall be intended to be an obligation, if the description in the declaration imports it to be one, although sealing be not averred.

DEBT sur obligation versus executor' q' plead q' A. port action in Trin. Term last, narrando quod cum per scriptum factum per le testator, &c. et ad judgment; et le plaintiff demur', q' scriptum factum poet estre et ny sigillat'.

DEBT on an obligation against an executor, who pleads that A. brought an action in Trin. Term last, declaring "*quod cum per scriptum factum per le testator, &c.*" and had judgment; and the plaintiff demurs, for that it may be *scriptum factum*, and yet not sealed.

And *Baldwin pro quer'* cited 2 Cro. 607. Cro. Eliz. 571.

*Weston e contra* cited 8 Co. *Turner's* case; and Cro. Car. *Goldsmith's* case.

*Cur'*—Est bone et les presidents sunt tiel, et serra intend obligation, q' en le declaration est dit q' le testator se obligasset, et port in Cur. *Jud' pro def' nisi* (a).

*Cur'*—It is good, and the precedents are so, and it shall be intended an obligation, because it is said in the declaration that the testator *se obligasset*, and *profert* is made. Judgment for defendant *nisi*.

(a) *Moore v. Jones*, 2 Ld. Ray. 1536. Comyn Rep. 139. and see the cases cited in note (1) to *Cabell v. Vaughan*, 1

Saund. 291, and Com. Dig. Pleader, 2 W. 9. *Post*, p. 375.

( C.290. )

AYLAND v. NICHOLLS.

Arbitrators award that the defendant should pay 20l. [ \* 266 ] to the plaintiff in satisfaction of all trespasses, and that they should give mutual releases to the time of the award. If further trespasses were committed between the times of the submission and award, the award, although it may be void as to the release

DEFENDANT pleads *Nullum fecerunt arbitrium*.

Plaintiff replied, and set forth the award, that the defendant should pay 20l. to the plaintiff in satisfaction of all trespasses; and likewise that they should give mutual \* releases to the time of the award, and assigns breach in non-payment of the 20l.

Defendant rejoins, that there were trespasses done between the submission and the award.

Plaintiff surrejoins that the arbitrators had not notice.

Defendant rebuts, that the arbitrators were present. Plaintiff demurs.

It was argued *pro quer'*—That the defendant's rejoinder was a departure from his bar: and the case of *House and Launder* cited (a), B. R. Mich. 14 Car. 2. and *Dean v. Easton* (b), B. R. Mich. 14 Car. 1. Rot. 456. *Rugly v. Witherly* (c), 15 Car. 1. B. R. Rot. 604. Hob. 190.

(a) S.C. 1 Lev. 85. 1 Keb. 414.

(b) S.C. 1 Keb. 434.

(c) S.C. cited 1 Lev. 85.



And the defendant in his rejoinder hath made the first fault; for when the arbitrators award 20*l.* to be paid in satisfaction of all trespasses; this is a reciprocal award, and of both parts. *Moor v. Bedell*. 10 Co. *Osborn's* case.

And although it be admitted void as to the releases, yet it is good in part, viz. as to the payment of this money in discharge, &c. which is a full award. 1 Rolle, 258.

And all the Court were of opinion that the award, as to the payment of the 20*l.* in satisfaction of all trespasses, was a good and full award; and though it were void for the residue, yet that ought to have been performed; and cited Cro. Eliz. 809, 904(d).

But they denied the law of *Lauder's* case; for if the award had been only to make releases, the defendant might plead *Nullum fecerunt arbitrium*; and when the plaintiff in his replication set forth the award, it was no departure to shew that trespasses were committed betwixt the submission and the award; for by that the award appears to be void, and so fortifies the bar of *Nullum Arbitrium*. *Jud' pro quer'*.

es, is good for the rest.

*Ante*, C. 62 b. C. 208.

*Post*, C. 632.

*Doe v. Richardson*, 8 Taunt. 697.

On plea of no award, the plaintiff states an award in his replication; it is no departure to rejoin matter of fact which makes it void(e). *Post*, p. 526.

(d) When an award shall be good in part and void for the residue, see Com. Dig. Arbitrament, E. 18, 19. *Pope v Brett*, 2 Saund. 292, and note (1), *ibid.* *Ingram v. Milnes*, 8 East, 445. *Doe v. Richardson*, 8 Taunt. 697. *Auriol v. Smith*, 1 Turner's Rep. 128-9. *Candler v. Fuller*, Willes, 62. *Johnson v. Wilson*, *ibid.* 253.

(e) This is contrary to many authorities. See Com. Dig. Pleader, F. 7. 1 Saund. 327, note (1). 2 Saund. 189.

*Mitchell v. Pope*, Lutw. 382. *Harding v. Holmes*, 1 Wils. 122-3. *Praed v. Duchess of Cumberland*, 4 Term Rep. 585-8. S. C. 2 H. Black. 280. But it seems to be agreeable to *Fisher v. Pimbley*, 11 East, 188. And note, that the award of releases in the principal case was not wholly void, but only as to trespasses committed after the submission. Bac. Ab. Arbitrament, (E) 1. *Keen v. Goodwin*, Bunb. 250. *Pickering v. Watson*, 2 W. Black. 1117.

### STAUNTON v. RANDALL.

S. C. ante, p. 260.

TRESPASS for taking his goods. Defendant pleads, and justifies by virtue of an attachment out of the Hundred-court; and the plea was ruled to be ill, because he doth not say that the *locus in quo* was within the jurisdiction of the Court.

( C. 291. )

Justification by attachment out of a Hundred court held ill, for not alleging the *locus in quo* to be within the jurisdiction.

[ 267 ]

### ALLEN v. ALLEN.

( C. 292. )

A plea of local justification, varying from the place in the declaration, must traverse all places extra, &c. Carth. 326. Lutw. 1437. 1 Saund. 85, n. (1). 1 Wils. 81.

ASSUMPSIT upon a bargain for malt *apud Chesterfield in Com' Darby*.

Defendant pleads, that at Macclesfield; in the county of Darby, the plaintiff brought the same action; and the defendant pleaded there, and the plaintiff was barred, and that the cause of action arose within Macclesfield, *absque hoc*, that it did arise within Chesterfield. The plaintiff demurred generally, and the plea was ruled to be naught, because he doth not traverse, *absque hoc*, that it did arise out of Macclesfield; for in transitory actions the defendant shall not draw the plaintiff from the place he layeth his action, &c. But here the Court gave the defendant leave to amend.

## DE TERM. S. HILARII, 1679.

IN COMMUNI BANCO.

( C. 293. )

BENTLEY v. DELAMOR.

A remainder may be limited on a fee in a surrender of a copyhold. A surrender *in futuro* is good.

[ \* 268 ]

COPYHOLDER surrenders to the lord, to the intent that the lord shall admit A., whom he intended to marry, after marriage; until marriage to the use of himself and his heirs, and after marriage to the use of himself and A. in tail.

\* The question was, whether the limitation of the estate upon the limitation of the fee precedent be good or not?

The cases cited were Rolle, 263. 1 Leon. 288. 2 Cro. 376. Godb. 274.

*Per tot. Cur'*—It is good enough to limit a remainder upon a contingent fee in copyholds, as in case of mortgages of copyholds (a).

(1) There seems to be an omission in the report here.

A surrender *in futuro* is good, and the mischief (1) for the freehold remains in the lord.

(a) Whether limitations of this nature be good in a surrender has been much disputed. For the different opinions and authorities on this subject, see Gilb. Tenures, 260-1-2. Fearn's Cont. Rem.

276-7, 7th edit. Watkins on Copyholds, 304—319, 2d edit. Sugd. Gilb. Uses, 254. Gwillim's Bac. Ab. Remainder, (G). and Sanders on Surrenders of Copyholds.

( C. 294. )

SMITH v. KNOWLES.

Testamentary guardianship is not assignable or devisable. A grandfather cannot appoint a guardian under stat. 12 Car. 2, c. 24.

THE grandfather deviseth the guardianship of his child according to the statute of 12 Car. 2. The question was, whether or no the devisee could grant or devise this guardianship over? And in this point the Court was divided in Chief Justice *Vaughan's* time; but now the Court were of opinion that this was a personal trust, and so could not be transferred (a).

2. They held that the grandfather was not a father in that law. *Jud' pro quer'* (b).

(a) Acc. *Bedell v. Constable*, Vaughan, 177. *Reynolds v. Lady Tenham*, 9 Mod. 40. *Eyre v. Countess of Shaftesbury*, 2

P. Will. 121. *Villareal v. Mellish*, 2 Swanston, 537. *Semb. S. C. 2 Atk. 14.* (b) Acc. *Blake v. Leigh*, Amb. 306.

( C. 295. )

JONES v. WALKER.

Plea held bad for omitting venue. *Sed vid.* 2 H. Black. 161.

ASSAULT and battery. The defendant pleads an arbitrament in bar, and doth not shew where the award was made. The plaintiff demurred, and for this reason the plea was ruled to be ill. *Jud' pro quer'*.

( C. 296. )

HILBERT v. LEWIS.

In a suit by executors, a plea in abatement that there is

DEBT by three executors. The defendant pleads in abatement, that there was another executor not named, and doth not aver that he was living.

*Baldwin pro def'*.—That the plaintiff ought to aver that he was dead, and cited Rastall, 300. Co. Ent. 120, 121. 2 Brownl. 131. 8 Co. *Henslowe's* case.

*Weston pro quer'* cited *Lovell v. Pigott*, Trin. 7 Car. 1. B. R. Rot. 1630, adjudged in point.

*Per Cur'*.—The defendant, if he plead in abatement, ought to aver that the fourth person is living; for it may be he might be dead before the testator, or before the writ purchased. *Jud' pro quer'*.

another not named, must aver that he is living. Acc. 1 Saund. 291 h. (note by Serjt. Willms.) Ast. Ent. 11.

[ 269 ]

( C. 297. )

VINIER v. JOYNER.

S. C. on error. T. Ray. 415.

DEBT upon a bond against the defendant as heir of Christopher Joyner.

The condition of the bond was, that whereas Christopher, the ancestor, did affirm that he had paid 60*l.* to H. L. which H. L. did deny, if Christopher, by the 10th of November, did not legally prove the money paid, then if he paid the money the said 10th of November, the bond should be void.

The defendant pleaded, that Christopher died before the 10th of November.

The plaintiff demurred.

*Simpson pro quer'* argued, that in a disjunctive condition, if one part become impossible by the act of God, the whole is discharged; but this is not a disjunctive condition.

*Stroud* argued *pro def'*, that the contingent being become impossible by the act of God, the bond is discharged; for he had till the 10th of November, to make his proof; and before that time he dying, that is become impossible by the act of God; and the proof was not to be made by his heirs, and cited 1 Inst. 206. Cro. Eliz. 396. 1 Roll. 447. Cro. Eliz. 277. Mich. 27 Car. 2. B. R. Rot. 543. Dyer, 262.

But the Court did hold this was not like a disjunctive condition, though it did depend upon a contingent; and the party having undertook to make proof, it was at his peril if he did not; and though he was prevented by the act of God, yet the bond was forfeited: and *Ellis* cited Moor, 645. 1 Rol. 451. Mich. 31 Car. 2. Rot. 321. C. B. *Jud' pro quer' (a)*.

The condition of a bond was, that if the obligor, by the 10th of Nov., did not legally prove money paid, then if he paid the money on the 10th, the bond should be void. Held, that the bond is not discharged by the death of the obligor before the day.

*Ante*, p. 228-9.

(a) Dyer, 33 a. pl. 10. 1 Salk. 170. "There is a difference where the condition contains a duty vested in the obligee and where it is only a collateral act; for in the first case the executors are bound to perform it, and so the obligor forfeits his

obligation if it be not performed; but otherwise where no duty, as to make a feoffment or to prove an allegation in a bill of equity," T. Ray. 415-6, citing Cro. El. 10. 2 Leon. 155. Dy. 262 a.

## DE TERM. PASCHÆ, 1680.

IN COMMUNI BANCO.

( C. 298. )

## HINTON'S CASE.

The Lord Chancellor has no authority to grant a commission of bankrupt without a petition in writing; but after such a petition he may grant, repeal, or supersede commissions *toties quoties* without a new petition. The grant of a new commission is a *supersedeas* to the old one.

STALY, a goldsmith in Covent Garden, was arrested upon the 8th of November, 1678, by one Stroude, who was executor of Clarke, to whom Staly owed 500*l.* to whom Staly gave good bail; but at the time of the arrest Stroude had not proved the will. Upon the 16th of November, Staly being indebted to Hinton (the defendant) and several others, delivered plate to the value of 1500*l.* to one Coles for satisfaction of those debts: afterwards, the 18th of November, Staly turns himself over to the King's Bench Prison: after this, the plaintiff and other creditors take out a commission of bankruptcy against Staly, and the commissioners assign this plate to the plaintiff, who brought an action of trover for the same against the defendant.

It was resolved in this case,

1. That there ought to be a petition in writing, to my Lord Chancellor, or else he hath no warrant to grant a commission, and then whatever the commissioners do will be void (a).

2. If there be once a petition in writing, my Lord Chancellor may grant and repeal commissions *toties quoties*, and needs not a new petition for a new commission, but may supersede the old commission, either for the miscarriage of the commissioners, or in case of death, or for any other \*reason, and may grant a new commission; and the granting of a new commission is a *supersedeas* to the old one.

3. The party being arrested the sixth of November by a warrant that bore date the 7th, yet if the warrant was made the 6th, it was sufficient to justify, for the warrant took effect from the delivery and sealing thereof.

Two doubts were made which were not resolved (1):

1. Staly here being arrested, and giving good bail, and afterwards continuing trading in his shop, and then becoming a bankrupt by not paying his debt in six months, &c. whether this shall relate to the time of the arrest, so as to avoid all contracts made by him in the mean time? And the Court said, it would be a mischievous case, if the law should be so; and it seemed to be within the words of the statute, but they would not deliver any opinion.

2d. Question, Whether the arrest, being made by the executor before probate of the will, was lawful or not, though the will was afterwards proved?

(a) Acc. 2 Chan. Ca. 191. The statutes 34 & 35 H. 8, c. 4, and 13 Eliz. c. 7, require a "complaint in writing," although a *parol* petition was said to be

sufficient in *Kirney v. Smith*, 1 Ld. Ray. 741. See 1 Christian's Bank. Law, 405-6-7, 2d edit.

A party is arrested on 6th Nov. by a warrant bearing date the 7th; the arrest is good.

(1) See *post*, *Duncombe v. Walter*, p. 539.

[ \* 271 ]

And these two points the Court had ordered to be found specially; but the cause went off against Hinton, because the assignment of the plate made to him appeared to be fraudulent (2), and so had not altered the property.

(2) Cowp. 629.  
4 Burr. 2235.

## DE TERM. S. MICHAELIS, 1697.

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IN COMMUNI BANCO.

## ANONYMUS.

(C. 299.)

*Quest. S. C. Ayres v. Falkland*, 1 Ld. Ray. 325. 1 Salk. 231.

A. POSSESSED of a long term for years, devises it to B. for life, and after his decease to C. for life, and saith nothing what shall become of the remainder of the term after the decease of B. and C., and the question was, whether the executors of C., or the executors of A. should have it as a reversionary term? And it was argued by *Levinz*, that the executors of C. should have it; for that in law, it being devised for life, the whole term passed, and C., being the last devisee, should have it. But it was held by the Court, that it should revert to the executors of A., because, it being expressly limited to C. for life, it doth not appear to be the intent of the testator, that his executors should have it; and they said, that since it was now held, that a devise of the remainder of a term after an estate for life was good, there could be no reason given why, if the remainder were not devised, it should not remain in the executors of the devisor.

A term of years is devised to several successively for their respective lives: after their decease it shall revert to the executors of the devisor. But if the last limitation be to C. generally (without saying "for his life"); or to C. and his assigns; or to C., and if C. die without issue, remainder over to another, then the executors of C. shall have it.

But it was here admitted, that if, after the death of B., it had been limited to C. and his assigns, or to C. generally, without saying for his life; or if it had been said, if C. die without issue (1), then to a third person; in all these cases the executors of C. should have it; but when the testator gives it for his life expressly, and is silent as to the *residuum*, there it shall remain with the executors of the devisor (a).

(1) 2 Freem.  
210, 237.

(a) In this case it was held "that the first devisee, and so every devisee in his turn, had the whole term vested in him; during which the next man in remainder and so every other after him had, not an actual remainder, but a possibility of remainder, and the executor of the devisor a possibility of reverter." 1 Salk.

231. 1 Ld. Ray. 326. *Kimpland v. Courtney*, 2 Freem. 250-1. *Fearne*, Cont. Rem. 487-8, 7th edit. On limitations of terms after a failure of issue, see *Fearne*, p. 459-489. *Purshoy v. Rogers*, 2 Saund. 388 k, notes. 8 Cruise's Dig. 500-517. 2d edit.

## DE TERM. PASCHÆ, 1698.

IN COMMUNI BANCO.

( C. 300. )

DIXON v. JAMES.

S. C. 2 Lutw. 1238.

*Quære*, whether one commoner can distrain the cattle of another, who surcharges with cattle not levant and couchant (a)?

Case lies by one commoner against another for surcharging with cattle not levant & couchant. In such case the lord may distrain. One commoner may distrain the cattle of another, where the common is for a certain number of cattle.

Any commoner may distrain the cattle of a stranger (d).  
1 Roll. 665.

[ \* 274 ]

So many cattle are levant & couchant, as the estate will keep in winter. 1 Vent. 54. 5 Term Rep. 46-8.

**THE case:**—The landholders had common for all beasts levant and couchant upon their estates; the plaintiff and defendant were both entitled to this common; and the plaintiff putting in more cattle than were levant and couchant upon his estate, the defendant distrained them: and the question was, whether one commoner might distrain another in this case?

It was agreed in this case, that one commoner might have an action of the case against another that put in more than were levant and couchant, and that the lord might in such case distrain (b); and that where a commoner was entitled to common for a certain number of cattle, as for ten, or any other certain number, there, if he surcharged, another commoner might distrain (c).

It was likewise agreed, that if a stranger, who hath no right of common, put in cattle, any commoner might distrain; but this was said to be a case not yet resolved, whether one commoner could distrain another for a surcharge in the case of levancy and couchancy. And so the Court took time to consider till the next term. But it seems to me, admitting that a distress may be taken for a surcharge by a commoner, where the common is for a certain number, that it is reasonable that it might be done in this case; \* for although it is now uncertain as to the number, viz. how many shall be levant and couchant upon an estate, that must be ascertained by the jury upon a trial; *et id certum est quod certum reddi potest*.

In this case it was said, so many cattle shall be said to be levant and couchant as the estate will keep in the winter.

*Adjournatur*.

(a) That the commoner cannot distrain in this instance, see *Atkinson v. Teasdale*, 3 Wils. 297, 291. *Hall v. Harding*, 4 Burr. 2426. S. C. 1 W. Black. 673. *Whiteman v. King*, 2 H. Black. 4. And see notes to *Mellor v. Spateman*, 1 Saund. 346 c. & d.

(b) That the lord may distrain, see

F. N. B. 125, *D. Atkinson v. Teasdale*, 2 W. Bl. 818. *Ellis v. Rowles*, Willes, 638.

(c) See *Hall v. Harding*, cited note (a), and the observation in Lutw. 1241. *Kenrick v. Pargiter*, Yelv. 129.

(d) 1 Rol. Ab. 405. *Whiteman v. King*, cited note (a), *supra*.

## ACTIONS FOR WORDS.

( C. 301. )

MANNING v. AVERY.—Pasch. 1673. C. B.

S. C. 3 Keb. 153.

Slander of title is not actionable without special

**THE** plaintiff declares, that whereas he did intend to sell his lands *alicui personæ vel personis*, the defendant said, "He



hath mortgaged B. for 100*l.* and to my knowledge he hath not power to sell them;" *et semble per le Court q' les parolls ne sont actionable*; because he doth not allege, that he was in treaty with any particular person, and that by these words he lost the sale. And whereas it was objected, that the last words, "And to my knowledge he hath not power to sell them," were actionable; it was answered, that these shall have relation to the first; and this is like the case, "He is a murderer, for he hath killed a hare (a)." *Jud' pro def' nisi.*

(a) Bull. N. P. 5. *Christie v. Cowell*, Peake's N. P. 4.

POTTER v. ELLIOTT.—*Pasch.* 1674.

( C. 302. )

"THOU art thy master's whore and concubine, and he hath the use of thy body as commonly as I have of my wife's." Resolved, that they are not actionable without alleging special damage, because the words are of spiritual conusance. Judgment arrested. And in *A. Davies's* \*case, 5 Co. 16, such words were actionable because of the special damage.

(a) *Ante*, p. 15. p. 50, C. 62. 3 Mod. 120. Dougl. 380 n.

Words, charging a woman with incontinence, not actionable without special damage (a).  
[ \* 275 ]

J. HUETT'S CASE.

( C. 303. )

"JOHN HUETT is a witch, and I will have him ducked." Resolved, that to call one witch is not actionable, without saying "He did bewitch a horse," &c. Judgment arrested *nisi*.

Calling plaintiff a *witch* is not actionable. 1 Rol. Ab. 44-5. Cro. Car. 324. 1 Sid. 52.

RAYNOLDS v. BLANCHETT.

( C. 304. )

THE plaintiff declares, that he was bailiff or servant to Mr. Gawdy, and the defendant said, "Mr. Farrer desired Mr. Gawdy to see farther how Raynolds did get his means, and that he was become a broker, and did not know but that he now and then threw in a load of corn, and that his wife was as chargeable as a lady, and if he kept him he would never let a foot of land." Resolved *per Curiam*, that they are not actionable; but if he had declared, that he had been his bailiff certainly, and had alleged a special damage, it had been good (a); and the saying Mr. Farrer said the words, whereas he said them not, (which was averred by the plaintiff), would not excuse him any more than if he had spoke them himself. Judgment arrested.

(a) *Vid. post*, p. 279. *Harris v. Tucker*.

An action lies for slanderous words, although the defendant reported them as spoken by another, the plaintiff averring that they were not so spoken. 7 Term R. 17. 5 East, 463. 4 B. & A. 605.

FORD v. FLETCHER.

( C. 305. )

"THOU hast a bastard." *Per Vaughan*.—The words are actionable. *Sed quære*, because it doth not appear that she was chargeable to the parish, and so not liable to corporal punishment (a).

(a) *Vide* Com. Dig. Action for Defamation, F. 20. 2 Salk. 693-4, pl. 2 & 3. *Hicks's case, ante*, p. 80.

Whether it be actionable to say, "Thou hast a bastard."

( C. 306. )

PASTNAGE v. WEEDEN.—*Hil.* 25. Rot. 1384.

Words, imputing insolvency to a trader, are actionable without special damage. Com. Dig. Action for Defamation, D. 25. 2 Ld. Ray. 1480. 1 Ld. Ray. 610.

THE plaintiff declares, that he did use to buy and sell timber, and to pay his debts, &c. and the defendant said these words, "Thou art a kind of a broken fellow, and wantest money to pay thy debts, and art 5 or 600*l.* in debt, and hast need enough;" and lays no special damage. *Per Ellis*.—To say of a merchant, "Thou owest 500*l.* and art not able, (or hast not a groat) to pay it," is actionable. But *quære* if there be not a difference to say, "Thou wantest money to pay it." *Et adjournatur*.

[ 276 ]

( C. 307. )

PRESTON'S CASE.

It is actionable to say of a dyer, with reference to his trade, "he is a cheating knave, for he cheated me." *Quære*, when the words charge him with being a rogue?

T. Ray. 62, 169. 5 Mod. 398. Hardr. 8. 2 Stra. 797. 2 Wils. 87. 2 H. Black. 531.

HE declares, that he was a dyer, and a *colloquium* being had by the defendant with his servant of him and concerning his trade, he spoke these words, "Where is the rogue, thy master: I will prove him a rogue."

And at another time, having the same *colloquium* with his wife, he said, "Where is that cheating knave thy husband: I will prove him a cheating knave, for he cheated me."

The first words seemed too general to be actionable.

But for the second, *per Ellis*, *Windham*, and *Atkins*, speaking of his profession, they are actionable; as in case of an attorney (*a*). Though it was moved by *Seise*, that they are not actionable, unless he had set forth in what particular he cheated him; and for that he cited Cro. Car. 417; but there was no *colloquium* had of his trade. Cro. Car. 552, where it was applied to his trade, they were.

(*a*) *Ante*, C. 14, and the next case.

( C. 308. )

SCROOP'S CASE.—*Mich.* 1674.

Words, imputing extortion and want of understanding to an attorney, are actionable (*a*).

"HE is a cheating knave, and takes extraordinary fees and extortion, and hath no more wit than an owl;" it appearing that the plaintiff was an attorney, actionable.

(*a*) *Ante*, C. 14. 3 Wils. 59, and the cases next preceding and following.

( C. 309. )

BELL v. THATCHER.—*Mich.* 1675. B. R.

S. C. 1 Vent. 275, differently reported.

To say of a letter-carrier that he breaks open letters, and takes out bills of exchange, is not actionable without a *colloquium* of his employment, although the loss of his place be alleged as special damage. 2 Salk. 694.

BELL was a letter-carrier, and the defendant spoke of him these words, viz. "He breaks open letters, and takes out bills of exchange;" and avers, that he thereby lost his employment; and held not actionable; for *Hale* said, by the same reason, if I had said of him, "That I gave him a letter to deliver on Tuesday, and he kept it till Wednesday," he might have an action. Afterwards, this case being moved again, the Court held the words were not actionable; because no *colloquium* was laid to be of his employment at the time when the words were spoken. And *Hale* compared it to the case of a bailiff; if it be said that he calls by false

measure, there being no discourse of his employment, they are not actionable. Hob. 76. And so if a man says of an attorney, that he is a knave, the words are not actionable, unless there be a *colloquium* laid concerning his practising as an attorney (a).

\* But if the words be such as do necessarily relate to his employment, then the words are actionable without any *colloquium*; as to say of an attorney "He is a knave in his practice," or "He arresteth without taking out writs," &c. these are actionable without any *colloquium*, because they necessarily relate to his employment.

(a) *Quære*, whether the special damage does not cure the want of a *colloquium* here? *2 Saund. 307 a*, note (1),

*Moore v. Meagher*, 1 Taunt. 44. *Post*, C. 314.

[ \*277 ]

A *colloquium* of employment is unnecessary, when the words spoken necessarily relate to it. 1 Lev. 280. *Ante*, p. 223. 2 Lev. 62.

WHITEHEAD v. FOUNES.—*Pasch.* 1676. B. R.

( C.310. )

THE plaintiff being a midwife brought an action for these words, "Thou art no midwife, but a nurse; and if I had not pulled thee from Mrs. J. S., thou hadst killed her and her child." *Per Curiam*,—They are actionable, because they disparage her in her employment and profession.

Words, disparaging a midwife in her profession, are actionable. 1 Vent. 21. 1 Vin. 462. *Post*, C. 314.

( C.310b. )

"THOU hast picked my pocket," without it be said "feloniously," or "I will hang thee," or some such subsequent explanation, not actionable; for, as *Wyke* said, it is a common saying, "The lawyers have picked my pocket." 1 Rol. 68, 73.

(a) 1 Vin. Ab. 508-4. 2 Lev. 51. 1 Vent. 213.

"Thou hast picked my pocket," not actionable, unless a felony be meant (a).

DUDLEY v. SPENCER.—*Trin.* 1678. B. R.

( C.311. )

"HE is an heretick, and denieth the articles of the Christian Faith." The Court inclined, that they were not actionable at common law without special damage alleged; but the party ought to sue in the Ecclesiastical Court. *Adjournatur till Mich. Term.*

Words, charging heresy, not actionable, without special damage. 1 Vin. 403. 3 Bl. Com. 125. *Ante*, p. 97.

WITHERLY v. JOHN HERMITAGE.—*Mich.* 1678.

( C.312. )

*S. C. Wetherhead v. Armitage*, 2 Lev. 233. 2 Show. 13.

THE plaintiff declares, that she was a dancing mistress, and several young gentlewomen were her scholars, and the defendant spoke these words of her, "She is as much a man as I am, and got J. S. with child;" *ratione cujus* she lost her scholars.

The Court did incline that these words were not actionable without alleging special damage; and the saying she lost her scholars is no special damage, but she ought to say which

To say of a woman who teaches dancing, that "she is a man, and got J. S. with child," not actionable without special damage (a).

Special damage must be alleged with particularity. 1 Rol. 63.

(a) In the other reports the word *Hermaphrodite* is used, and in Shower,

the words are said to have been held actionable.

she lost in particular; as in loss of marriage, it must be said with such a person in particular; and so where title to land is slandered, the plaintiff must shew, that he was in communication with such an one, &c. 4 Co. 19 (b).

[ \* 278 ]

\* *Holt pro quer'* took this difference; where the special damage is one particular, as in case of marriage, there the very person ought to be alleged; but where it may be in several particulars, as in this case, there it is not necessary to allege any particular scholar that she lost, but to say in general, that she lost her scholars; and he compared it to the case in 1 Roll. 63, of one that had children to board, &c. *Curia advisare vult.*

(b) On the particular statement of special damage in actions of slander, see Sir W. Jo. 196. *Anonymous*, 1 Vent. 348. *Browning v. Newman*, 1 Stra. 666. Bull.

Ni. Pri. 7. *Hartley v. Herring*, 8 Term Rep. 130. *Ante*, p. 274, C. 301. *Post*, C. 318. *Morris v. Langdale*, 2 Bos. & Pull. 284.

(C. 312 b.)

*Semb. S. C. Newton & ux. v. Masters*, 2 Lev. 233.

To say of the plaintiff, that "she kept a bawdy house" (in the past tense), is actionable. Cro. Jac. 622. Com. Dig. Act. for Defamat. E. 9. 2 Stra. 1189. 2 Term Rep. 473. Bac. Ab. Slander, (F).

"SHE is a strumpet and a bawd, and kept a bawdy-house.

Moved by *Darnell* in arrest of judgment, because for the words "strumpet" and "bawd," they are not actionable; and the latter words do not accuse her with a present crime; as to say "J. S. had the French pox" is not actionable. Noy, 51. Style, 22.

But *per Cur'*,—The cases are not alike; for though a man had the French pox, yet he may be free now; and so the reason why these words are actionable in the present tense is, because of the frightening people from converse, which there is no cause for when the party is well again; but in this case, if the plaintiff did formerly keep a bawdy house, he is punishable for it still. Judgment *pro quer' nisi*.

(C. 313.)

BANFIELD v. LINCOLN.—*Trin.* 1679. B. R.

"He is a great rogue, and killed a man, and if he had not given money to have taken himself off, he had suffered for it:" held actionable words.

"HE is a great rogue, and killed a man a-board a ship, and if he had not given money to have taken himself off, he had suffered for it."

It was moved in arrest of judgment, that the words were not actionable; for to say "one hath killed another" is not actionable, for it may be done in execution of justice; or justifiably, as where another goes to rob me on the highway; to which the Court inclined. [1 Roll. 72] (a).

But here the Court were of opinion that the words were actionable, by reason of the following words, "if he had not given money he had suffered" which shews that he intended a felonious killing. 2 Cro. 423. 1 Roll. 72. *Jud' pro quer'*.

(a) But see Com. Dig. Act. for Defamat. D. 2. *Rivers v. Lite*, 2 Stra. 1130.

GYLES v. BISHOP.—*Trin.* 1680.

( C. 314. )

THE plaintiff was a midwife, and brought an action for these words spoken by the defendant, viz. "She layeth no woman, but Dr. Chamberlain or his lady doth her work;" \* by reason whereof she lost her employment, and sheweth particularly the employment of such a person.

Words, imputing want of skill

[ \*279 ]

to a midwife, are actionable, at least with special damage. Cro. Car. 211. Ante, C. 310.

Moved in arrest of judgment by *Crooke*, that the words are not actionable. *North* inclined that they were not; for it is no more than if it should be said of a lawyer, that "he draweth no conveyance without the assistance or advice of the Attorney-General;" and though a special damage be alleged (1), yet if the words do not import scandal, they are not actionable. *Ellis* doubted. But, *per Cur'*,—Let judgment stay till the others move. Afterwards, it being moved again, the Court were of opinion that the words were actionable, because the law is very tender of people's employments and professions, and it being a special damage; and it is a scandal to her, and implieth that she hath but little skill, and cannot do her work without the help of another. And *per North*,—To say of a lawyer "he never gives his advice, but he consults others," is actionable. 1 Roll. 54, 55.

(1) *Vid. ante*, c. 309.

To say of a lawyer, "he never gives advice, but he consults others," is actionable. *Per North*, C. J.

Mich. 1680.

For calling one "papist and pensioner." *Vide post*, Case 714. ( C. 315. )

HARRIS v. TUCKER.—*Pasch.* 1681.

( C. 316. )

THE plaintiff was bailiff to Sir Sandys Fortescue, and the defendant said of him, "He is a cheating cousening rogue, and hath cheated Sir S. Fortescue;" and being asked wherein, he answered "in many things." Verdict *pro quer'*. The Court inclined, that these words were not actionable; because he doth not charge him with cheating in his employment, neither hath he laid any special damage. Roll. 62. Hob. 76.

To say of A's bailiff, that "he is a cheating cozening rogue and hath cheated A. in many things," not actionable without special damage, or reference to

his employment. 1 Vin. 427-8. *Ante*, C. 304.

DORRELL v. GROVE.—C. B.

( C. 317. )

"HE is a filching thieving rogue, and so was from his cradle, and I'll prove it; and he can be no other, for he carried away boards and timber from this house into a wood hard by, and there kept it till the coast was clear, and then took them to his brother's house, and there set them up." Verdict *pro quer'*.

*Semb.* to say of one "he is a thieving rogue, for he carried away boards and timber," &c. is actionable. 1 Sid. 373, Cro. Jac. 81. 1 Viner, 428-9.

Argued that they are not actionable, for *thieving* imports only an inclination. Three Justices incline *q' sont actionable*:

*thieving* imports an act, *thievish* is but an inclination. *Charlton e contra* (a).

(a) To impute evil inclinations only is not actionable. *Harrison v. Stratton*, 4 Espin. 219. Com. Dig. Act. for Defamat. F. 12. But see *How v. Prinne*, 2 Ld. Raym. 813, *cont.* in the case of a public

officer. The distinction in the principal case between adjectives importing an act and an inclination is also adverted to in *Osborn v. Poole*, 1 Ld. Ray. 236.

[ 280 ]  
( C. 318. )

GETLEY v. MUNT.—C. B.

To say of a taylor, that "he had entered himself a prisoner in the K. B." not actionable without special damage.

THE plaintiff being a taylor, the defendant said of him "that he had entered himself a prisoner in the King's Bench," *per quod* he lost his credit in buying and selling. Verdict *pro quer'*.

Resolved, that the words are not actionable without laying special damage, and the verdict will not help it; for if he doth not specially allege his damage, the defendant doth not know how to prepare for his defence (a). 1 Roll. 230. Cro. Eliz. 83.

(a) *Vid. ante*, C. 312.

( C. 319. )

SIR T. CLARGES v. ROWE.—*Mich.* 1681. C. B.

S. C. 3 Mod. 26. 2 Show. 250. T. Ray. 482. 3 Lev. 30. Skin. 68, 88.

To say of an officer (as a deputy lieutenant) that he is a *Papist*, is actionable: *Quære*, if spoken of a common person? Words, not actionable formerly, may become so by acquiring a worse acceptance by usage. Cited 2 Ld. Ray. 812. 2 New Rep. 52.

THE plaintiff declared, that he was a deputy lieutenant, and stood to be elected to serve in Parliament, and that the defendant said he was a *papist*. Verdict *pro quer'*, 100 marks damages.

It being moved in arrest of judgment, that to call a man *papist* was not actionable; it was held by all the Judges, that the plaintiff being a deputy lieutenant, &c. the words were actionable; and although it may be formerly it would not have been actionable; yet now, since the word *papist* had by usage acquired a worse acceptance, to speak it of an officer is actionable: and *Charleton* held, that to call any man a *papist* would be actionable; for it is as much as to say in a manner, that he is a traitor, or at least one that owns the supremacy of the pope; as *dunce* formerly signified a learned man, but now the signification is so much altered, that to call a lawyer *dunce* is actionable (a).

The cases cited were 2 Broul. 166. *Ireland v. Smith*, Trin. 27 H. 8, pl. 4. And *Levinz* (1) cited several cases where words would be actionable spoken of an officer, that would not be so in the case of a common person. 2 Cro. Sir Jo. Tasborough's case, 2 Roll. Rep.; the same case, Cro. Eliz. 191. Sir W. Walgrave, 2 Cro. 202.; *Smith v. Turner*, 2 Cro. 56. Sir Jo. Harper, Cro. Eliz. 358. Sty. 22, 23. *Hammond v. Kingston*, Hetley, 167, 168. Cro. Eliz. 502. Sty. 363, 364.

(1) He was one of the judges. 3 Lev. 31.

(2) S. C. 1 Vent. 50. 1 Mod. 22, 1 Lev. 280.

*Mich.* 21 Car. 2. B. R. (2). Sir Jo. Kerne v. Osborne, to say of a justice of peace "he is forsworn," is actionable (b).

(a) See other instances in T. Raym. 483. S. C.

(b) See Sir J. Cutler's case, *post*, p. 530. Wyndham and Charlton, JJ. held



the words actionable in the case of a common person "in respect of the penal laws against papists; more especially at this time just after the popish plot, for it is dangerous as to their persons to be reputed a papist in respect of assaults by the rabble." North, C. J. and Levinz dis-

sented from this opinion, 3 Lev. 31, but the Court of K. B. on error appear to have adopted it. T. Ray. 483. See the observation of Holt, C. J. in *Turner v. Ogden*, 2 Salk. 696, and of De Grey, C. J. in *Onslow v. Horne*, 2 W. Bl. 753, and cases collected in 1 Viner Ab. 403-4.

ERRONEOUS ENTRIES.

[ 281 ]  
( C. 320. )

**Scire pro sciri** in a *venire facias*, error in an inferior court; but *scir'* with a dash turned up is well enough. *Vide ante*, Case 122, p. 104.

*Scire for sciri* in inferior court, is error.

INFANCY alleged in error, and concludes, *et hoc paratus est verificare prout Curia considerabit*; and good. *Vide ante*, Case 126, p. 106.

(C. 320 b.)

TRESPASS *vi et armis en le Court de Windsor, et misericordia* instead of a *Capiatur*, and judgment reversed. Trin. B. R. 1673, *inter Underwood and Burlacy*.

(C. 320 c.)

Entry of *misericordia* instead of *capiatur* is error in inferior court. 9 Viner, 571-2.

HAWKINS v. WILLS.

S. C. 2 Lev. 102. 3 Keb. 301.

( C. 321. )

In the *venire facias* there was XII<sup>m</sup>. in this manner; *et per Curiam*, it is good; but if it had been 12 it had been bad, but the Roman figures are good.

Roman figures may be used in a *venire*: *Semb. Vid. 1 Vent.*

And it was said by *Wild*, that *consideratum est per majorem* is bad, but *consideratum est per majorem in Curia* is good, for otherwise it might be in a tavern (a).

256. 2 Lilly Ab. 128, 138. 1 Sid. 40. *Consideratum est per majorem* is bad, without adding *in curia*.

(a) The writ of error was brought on the judgment of an inferior Court, see 2 Lev. And see further on such entries, 2 Lill. Ab. 131. 1 Saund. 74 a, Com. Dig. Courts, P. 13. 1 Ld. Ray. 147-8.

The Roman figures were proper, because pleadings were at this time in *Latin*. Com. Dig. Courts, P. 9. 1 Salk. 195. 2 Hale, H. P. C. 170.

ROGERSON v. JACOB.

S. C. 3 Kebl. 251, 302.

( C. 322. )

IN Norwich Court.—It was resolved, that in an action upon a bond the plea *non dedicit factum, sed inquiratur de debito*, is well enough, being according to the usage. And the custom in those cases is, if the party hath paid the money, to find for the defendant; and so is the usage in London. *Per Wild, &c.*

Action on a bond in Norwich Court; the plea *non dedicit factum sed inquiratur de debito* is good by custom (a).

(a) Acc. Cro. El. 894. 1 Mod. 96. 1 Vent. 256, 196.

(C. 322 b.)

PRÆCEPTUM *est* in the *venire facias*, and doth not say *per Curiam*; and the judgment in the inferior court was reversed. *Post*, Case 390, 395.

*Præceptum est*, omitting *per curiam*, is bad in inferior court.

( C. 323. )

THE KING v. PARSONS.

The entry of the award of a *venire* may be in the past tense. *Post*, C. 388. 2 Saund. 393. 1 Mod. 81.

ERROR to reverse a judgment: the record certified was *præceptum fuit vicecom'* for the *venire facias*, whereas it ought to have been *præceptum est*, for the record itself is to be certified, and not the history of it. *Hale semble q' est bone*, because it is not in the *venire* itself, but only the awarding of it. *Twisden*, that it is naught, and hath been so ruled oftentimes, especially as the record here is, for it is *quod defend' ponit se super patriam*, and then the *venire* being in the *preterperfect tense*, it is as though the *venire* had been awarded before issue joined. *Advisare vult Cur'*.

Afterwards it being moved again, they held that *præceptum fuit* was well enough, and most of the precedents are so.

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## PROHIBITIONS.

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( C. 324. )

SIR OLIVER BUTLER'S CASE.—*Trin.* 1673. C. B.

S. C. 3 Keb. 187.

Prohibition denied on suggestion by the party that he was sued for alimony, and had pleaded a trust-deed for separate maintenance, which the Spiritual Court had refused to admit.

A court of law cannot notice a deed of trust (a).

[ \* 283 ]

*Post*, p. 300, C. 359.

SIR OLIVER BUTLER'S lady sued him in the Spiritual Court for alimony; and he came by Serjeant *Baldwin*, and moved for a prohibition, and suggested that he had by indenture conveyed over lands to trustees of the value of 300*l.* *per ann.* for her separate maintenance, and that they shewed this in the Spiritual Court, but they refused to admit it, &c.

*Per Curiam*,—No prohibition, for this Court cannot take notice of a deed of trust; but if it be proper for them to move for a prohibition any where, they must go into Chancery, for the execution of trusts properly belongs to them. But besides, alimony is a thing that the Ecclesiastical Court hath properly cognisance of (b); and if there be a separate \* maintenance already, they will take it into consideration, at least by way of defalcation in the alimony; and if the party be charged too hard, he may have his appeal (c).

(a) *Marshall v. Rutton*, 8 Term Rep. 547, *per* Kenyon C. J. Yet Courts of law are in the daily practice of noticing trusts, although they may have no jurisdiction to enforce the execution of them. See the observations of Ashurst, J. in *Winch v. Keely*, 1 Term Rep. 622, and of Buller, J. in *Master v. Miller*, 4 Id. 341, and *Reake v. Lea*, *post*, p. 480-1.

(b) Acc. Cro. Jac. 364. Com. Dig. Chancery, 2 D. 3. In what cases Chan-

cery will decree alimony, see 1 Fonbl. Treat. of Eq. p. 105, 5th edit. That deeds of separation are not pleadable in the Ecclesiastical Court as a bar to its proceedings, see *Mortimer v. Mortimer*, 2 Haggard Rep. 318. As to their validity in equity or at law, see *St. John v. St. John*, 11 Ves. Junr. 526. *Jee v. Thurlow*, 2 Barn. & Cress. 547.

(c) *Semb.* S. C. in Chancery, *Turner v. Boteler*, Finch Rep. 73.

( C. 325. )

THORNTON v. PICKERING.—B. R.

3 Keb. 200.

A. is adjudged to be the father

THE defendant sued the plaintiff in the Spiritual Court for

saying "He was the father of a bastard child." The plaintiff says, he spoke them at the sessions, where the defendant was adjudged to be the father, and to maintain the child. The defendant says he spoke them out of sessions. And the plaintiff demurs, and had the prohibition, *per Curiam*.—For by the statute of (b) ——— the sessions are made judges of the fathers of bastard children, and therefore they shall not try it over again in the Spiritual Court, for he is legally convicted; and it is like as if a man be convicted of perjury, any man may call him "perjured," and justify.

of a bastard at Sessions; he will be prohibited from suing B. in the Spiritual Court for calling him "the father of a bastard" (a).

- (a) Cro. Jac. 625. 2 Rol. Rep. 82. *Ante*, p. 68. 1 Show. 337. 1 Ld. Ray. 394.  
(b) 18 Eliz. c. 3. 3 Car. 1, c. 4.

*Trin.* 1674.—C. B.

( C. 326. )

*Semb. S. C. Birch v. Lake*, 1 Mod. 185.

It was said *per Curiam*, that if an Ecclesiastical Judge do put any person to accuse himself upon oath, a prohibition ought to go. *Vide* Stat. 17 Car. 2. 13 Car. 2, 12.

And that in no case the Spiritual Judge ought to cite a man *ex officio*, although the matter be of spiritual conusance; but that it ought to be presented by the churchwarden, minister or vicar; and then he might proceed: and the Spiritual Judge ought to proceed against a man *ex officio* no more than a Judge of assize, &c. who though he knows of misdemeanors, yet cannot take notice of them, so as to punish them till they be presented by a jury (a). And here a prohibition was granted to Sir Ed. Lake, for citing the plaintiff for not coming to church, nor standing up at the confession, &c. because he cited him *ex officio* without any presentment.

An ecclesiastical judge cannot put any one to accuse himself on oath. *Post*, p. 290, 296. A spiritual judge cannot, any more than a judge of assize, &c. proceed against a man *ex officio*. F. N. B. 41. A. 2 Vent. 41. 2 Inst. 658. 12 Co. 26.

(a) The presentment of a jury is not always necessary: the general rule seems to be "that no man is to answer the king's suit *without some record* importing his charge." See Shower's argument in the case of *The King v. Berchet*, 1 Show. 107-8-9, 110. Bacon on Government, 2d part, p. 92, 5th edit. quarto. This includes informations filed of record, and some

other methods of proceeding in criminal cases which are now disused. (See the above argument). So in the case of contempts done *in facie curiæ*, a record may be made of it and a punishment judicially inflicted and executed immediately. *Ibid.* 110. *Mayhew v. Locke*, 2 Marsh. Rep. 380. 4 Bl. Com. 286-7.

MILLER'S CASE.

*S. C. Miller & Miller v. Potter*, 3 Kebl. 358.

( C. 327. )

A PROHIBITION was moved for by Mr. Pawlixton to the Consistory Court of the bishop of Exeter. The case was, the plaintiff's father had issue three daughters, the two plaintiffs and another, and dying intestate his wife \* administered, and died, and made the two plaintiffs her executors, who had several bonds, some in their own names, and some in the name of their mother, to whom they were executors; they also took out administration *de bonis non* to the father. It was suggested in the Spiritual Court, that some bonds which they had in their own names were in trust for their father;

A trust is not examinable in the Spiritual

[ \* 284 ] Courts. 2 Rol. Ab. 285. Hob. 265. 3 Dow. & Ryl. 41. 1. Barn. & Cres. 655.

and that some bonds in the mother's name were debts owing to the father, but the mother being administratrix had altered the property, and taken them in her own name; and the third sister sued for distribution of these debts.

As to the first part, the Court were of opinion, that a prohibition should go; for a trust is not examinable in the Spiritual Court; for they are not a Court of Equity.

As for the other part, they would deliver no opinion, the Court not being full, it being upon the construction of a new act of parliament (a).

An obligee A. dies, and makes B. his executor, who delivers up the bond, and takes another in his own name, and dies intestate: what remedy have A's creditors, and against whom?

*Twisden* put this case:—A. hath several debts owing by bond, and dies, and makes B. his executor, who delivers up these bonds, and takes bond in his own name, and dies intestate.

The question is, how the creditors of A. shall recover these debts (there being no other assets) of the administrator *de bonis non* of A. or the executor [*administrator*] of B. It seemeth there is no way but by a special action of the case against the executor of B., for the altering the bonds is no *devastavit* (b).

(a) Keble reports the Court to have held that "though the administrator might be sued for distribution, notwithstanding the taking new bonds in his own time, yet, he dying, his executor or administrator cannot be sued."

(b) But *semb.* this is a *devastavit* at law, although not in equity. *Armitage v. Metcalf*, 1 Chan. Ca. 74, and see *post*, *Norden v. Leven*, p. 442. 2 Lev. 189. T. Jo. 88. *Barker v. Talbot*, 1 Vern. 473-4. And at the time of this decision

the personal representative of the executor was not chargeable at law in respect of the *devastavit*. *Post*, p. 313, 392. See now 30 Car. 2, cap. 7. 4 & 5 W. & M. cap. 24. If the substituted security taken by the executor be one on which he may sue in his representative character, it will devolve to the administrator *de bonis non*, &c. of the original testator. *Catherwood v. Chabaud*, 1 Barn. & Cress. p. 150-4-5. S. C. 2 Dow. & Ryl. 271.

( C. 328. )

CORNY and CURTIS v. COLLIDON.

S. C. 2 Lev. 119. 1 Vent. 297. 3 Kebl. 359, 434, 439.

The defendant's mother, being taxed to repair a church, was excommunicated for non-payment: *semb.* an action lies against the defendant on a promise to the plaintiffs, being churchwardens, that in consideration the bishop, at the instance of the defend-

[ \* 285 ]  
ent, would absolve her mother, she would pay, &c. And *semb.* a

THE defendant's mother, being taxed to the repairs of the church, for non-payment was excommunicated, and the defendant promised the plaintiffs, being churchwardens, that in consideration the bishop, at the instance of the defendant, would absolve her mother, that she would pay it, &c. and averment was made, that the bishop had absolved her *prout*, &c.

It was moved in arrest of judgment, because the plaintiffs do declare by the name of *nuper gardiani*, and are not *gardiani* at the time of the action brought, and therefore this action should have been brought by their successors. 1 Leon. 177; where an action of trover for goods ought to be brought by the present churchwardens.

\* But the Court said this case differed from that, for this is brought upon a collateral promise; and where a promise is made to a stranger upon a good consideration, he that hath interest in the promise shall have the action; and Justice *Wylde* cited *Yelv.* 1.

Another objection was, that notice of the absolution was not alleged. It was answered *per Curiam*, that where the thing lies as well in the notice of the defendant, as of the plaintiff, there the defendant shall take notice at his peril; and so he ought in this case (a).

But the great question was, whether or no here was any consideration, because they have not alleged that they were churchwardens at the time of the promise made, whereby it might appear they had any right to demand the money; and then the case will be no more than if the promise were made to a stranger, if the bishop would absolve at her request. But if it had been in consideration that the plaintiffs consentirent, or would not obstruct it, or that the bishop at their instance would absolve, it would have been well enough: *per Twisden. Sed nunc dubitaverunt. Adjournatur. Et postea* judgment was given for the plaintiff (b).

declaration by the plaintiffs as late churchwardens, without alleging that they were churchwardens at the time of the promise, is good after verdict.

When a promise is made to a stranger on good consideration, he that has an interest in the promise shall sue. *Post*, p. 471.

(a) *Ante*, p. 31-2. p. 254. Com. Dig. Fleader, C. 75.

(b) In *Ventris* it is said that "it could not be intended but that the bishop absolved at their (the plaintiffs') instance,

and would not have done it, but upon the account of the promise of paying the money to them." *Vid.* Com. Dig. Action upon Assumpsit, B. 6.

( C. 829. )

A PROHIBITION was prayed to the Bishop's Court of Exeter, upon a proceeding there against the plaintiff, upon a presentment made by churchwardens, that the plaintiff had absented himself from church four sabbath-days.

And it was moved by Serjeant *Jones* for a prohibition, 1. Because the sabbath-day is Saturday, and the party is not bound to be at church upon a Saturday, unless it be a holiday. But to that the Court answered, that sabbath-day now is intended our sabbath-day, and so it is called in the liturgy and in the fourth commandment. 2. It is not said what sabbath-days he was absent from church, so that the plaintiff cannot tell how to prepare for answer; for perhaps it might be before the act of pardon, and then the offence is pardoned. *Vaughan*: we are not judges of the forms of their proceedings in the Spiritual Court; but if it be irregular, the party may be remedied by appeal, when the subject-matter is properly within their jurisdiction. *Windham*: The charge ought to be certain, that the party may know how to make his defence, or else it will be like the case of a general citation. *Nat. Brev.* 41. And though it was said, that it must be intended for sabbath-days within the year that he is churchwarden; yet *Ellis* answered, as to \*that, that the churchwardens may present an offence committed before they came into their office; as absence from church for seven years together hath been presented by churchwardens. A prohibition *nisi* was at last granted.

*Semb.* a prohibition lies, when the libel in the Spiritual Court is too general. *Post*, C. 332, 347. *Hardr.* 364. By the *Sabbath-day* shall be intended *Sunday*. [See proceedings and debates in the H. of C. 1 vol. p. 45. 2 vol. p. 97, printed at Oxford, 1766.]

The courts of law are not judges of the forms of proceedings in the Spiritual Courts. *Post*, C. 332 and 341.

[ \* 286 ] Churchwardens may present offences committed before they came into office. *Per Ellis, J.*

( C. 330. )

Hil. 1674.

Semb. *S. C. Rogers or Curtis v. Davenant*, 1 Mod. 194. 2 Mod. 8.

The chancellor of the diocese cannot grant a commission to tax parishioners for the repairs of the church.

1 Mod. 223.

Gibs. Codex. tit. 9, c. 4. 12 Mod.

328. 17 Viner, 578.

A PROHIBITION was granted in the Common Pleas to Dr. Exton, Chancellor of London. The case was: a church then being out of repair, he granted a commission to some of the parishioners to make a tax for the repair of it, which tax some of the parishioners refused to pay; and thereupon a libel was preferred in the Bishop's Court against them: and they moved for a prohibition, and had it. *Per Curiam*: Because that way of taxation by commissioners is against law; and taxes for repairs of churches ought to be made by the churchwardens and the major part of the parishioners; which if they refuse to do, the Spiritual Court may proceed against them all by excommunication, unless they submit; and though the Spiritual Court may compel the parishioners to make a tax, yet they cannot constitute commissioners to make this tax. *Vide* 5 Co. 64 (a).

(a) If the rate, so imposed by an illegal commission, be afterwards confirmed by the majority of the parishioners, it is made good. 1 Mod. 194.

( C. 331. )

BARTON'S CASE.—*Trin.* 1675. B. R.

*S. C. post*, p. 289. Semb. *S. C. Bastard v. Stukely* 3 Keb. 440, 458, 490, 613, 676, 686, 755, 828. 2 Lev. 209. T. Jo. 130. 2 Show. 50.

A. DIES, and makes B. and C. his executors, and devises a legacy to them betwixt them; B. takes husband and dies, and the husband sues C. in the Ecclesiastical Court for a moiety; for in that court they will not allow any survivorship; and therefore C. moved for a prohibition; and, it being opposed, it was granted *per Curiam*. And the Court told them, if they were not satisfied, they might demur to the declaration. *Vide* 2 Roll. 301. *Mes nota, q' le suit la est pur un legacy, mes icy le legatee est mort.*

( C. 332. )

*Trin.* B. R.

Prohibition to the Spiritual Court refused, for uncertainty

[ \* 287 ]

in the libel. *Ante*, C. 329. *Post*, C. 347. Hardr. 364. 1 Stra. 484.

(1) *S. C. Cro. Jac.* 159.

A PROHIBITION was moved for, because the libel in the Ecclesiastical Court was against the plaintiff for not coming to church at all, or very seldom; because *very seldom* was utterly uncertain. But to that it was answered \**per Curiam*, that that was their form of proceeding there; and though such a pleading here would have been naught, yet it being according to their form of proceeding, it was well enough; and if it was not, they might help themselves by appealing. And *Twisden* cited a case, where a libel was for speaking scandalous words, *vel his similia* (1); and the Court would grant no prohibition, because it was their usual way of proceeding.



( C. 332b. )

If the Ecclesiastical Court refuse to give a copy of the libel, the party may have a prohibition (upon affidavit made of it) *quousque* they grant a copy of the libel. Nat. Brev. 43. 1 Rol. Rep. 305 (a).

The Ecclesiastical Court will be prohibited *quousque* they grant a copy of the libel.

(a) Stat. 2 Hen. 5, c. 3. 2 Salk. 553. Com. Dig. Prohibition, F. 15. 18 Viner, 32. 2 Gibs. Codex, 1051, 1st edit.

( C. 333. )

A. THE parson of M. died, and B. was presented and died, and then C. was presented; and he sues the executors of A. for dilapidations. And a prohibition was moved for, because that there had been an intermediate parson (B.) presented; but it was denied in the Common Pleas. And now the King's Bench being moved, it was denied here likewise; because the consance of the matter properly belonging to the Spiritual Court, if they proceed irregularly, the party may appeal.

No prohibition in a suit against executors for dilapidation. Regist. Brev. 48.

WORTESLEY'S CASE.

( C. 334. )

*J. C. Wortly v. Watkinson*, 2 Lev. 254. T. Jones, 118. 3 Keb. 620, 660. 2 Show. 70.

He moved for a prohibition to the Ecclesiastical Court where he was sued for marrying his wife's sister's daughter; and the question was, whether or no that was within the Levitical degrees? and Sir *Jo. King*, who moved for a consultation, held that it was; he laid it down for a rule, that where any marriage is prohibited to the male, the same is prohibited to the female *in pari gradu* (1); *et sic vice versa*; and he said, this is the very same degree that is in *Levit.* xviii chap. 14 ver. for there the nephew is forbid to marry the aunt, and here the uncle marries the niece. But *Twisden* said, there is a difference between the niece marrying the uncle, and the nephew marrying the aunt; for in this latter case the aunt loseth her superiority, but in the former the uncle keepeth it; and he said, in *Parson's* case, in 1 Inst. a consultation was granted (2), which is the very same with this; and he cited *More's* case, Moor, \*907. Cro. Eliz. 228. 2 Inst. 683. Hil. 11 Car. the case of *Allen and Watts*, Hob. 181. 2 Roll. 832. But the Court doubted of it, and ordered the defendant to demur to the prohibition (a).

Whether a man may marry his wife's sister's daughter?

(1) *Ante*, p. 168.

*Ante*, p. 171. And see 5 Mod. 448. Gilb. Rep. 158.

(2) *Ante*, p. 73, 170.

[ \* 288 ]

(a) A consultation was granted. See 448. *Donny v. Ashwell*, 1 Stra. 53, and the other reports. And see *Abraham v. Bird*, post, p. 511. *Snowling v. Nursey*, 2 Lutw. 1075. *Clement v. Beard*, 5 Mod. 448. notes to 32 Hen. 8, c. 38, in Gibs. Codex, tit. 32, ch. 1. 15 Viner, 256-7. *Ellerton v. Gastrell*, Comyn, 818.

( C. 335. )

B. DEVISES a legacy to C. and makes D. his executor, and dies; D. makes E. an infant his executor, and dies, and administration is committed to F. *durante minore ætate* of E. C. the legatee sues F. in the Spiritual Court for his legacy; and F. moves for a prohibition: but the Court denied it; for

The administrator, *durante minoritate* of the executor of an executor, is the representative of

the first testator. 2 Bl. Com. 506. although an administrator of an executor is not an administrator to the first testator, yet an administrator *durante minore ætate* is *loco executoris*, and may be sued, as the executor of an executor may (a).

(a) Contra, *Limmer v. Every*, Cro. El. 211, as cited by Lord C. B. Gilbert in *Bac. Ab. Executors*, (B), 1, [2 vol. p. 381, 5th edit.] but that case hardly supports him; and in Leonard's report of the same case under the name of *Lim-*

*ver v. Evorie*, 4 Leon. 58, it is said only that such an administrator should sue as administrator of the first testator. *S. C.* cited Godolphin's *Orph. Leg.* p. 89; and see *Norton v. Molineux*, Hob. 246.

( C. 336. ) WATERFIELD v. THE BISHOP OF CHICHESTER.—*Mich.* 1676. C. B.

*S. C.* 2 Mod. 118.

The Ecclesiastical Court may require an oath from the churchwardens, "to present all offences against the king's ecclesiastical laws, according to law," but not "to present all offences against the articles of visitation."

THE plaintiff obtained a prohibition, upon a suggestion, that he being churchwarden, and refusing to swear to the articles contained in a book that the bishops send about at the visitation, was presented in the Ecclesiastical Court, notwithstanding he offered to take an oath to execute the office of a churchwarden according to law.

But it appearing afterwards, that the oath they required of him was, that he should present all offences against the king's ecclesiastical laws according to law, and for his direction was to have one of those books: and thereupon the Court granted a consultation; because "according to law" did govern the whole oath; and here he was not bound to present all offences against the matter in that book, but such as were against law (a).

To translate and print a writ of prohibition is a contempt. *Vid.* 2 Mod. 119.

And this prohibition being printed and translated into English, they said it was a contempt to this Court, and if they could find the parties they would punish them.

(a) The objection to the oath was, that the articles contained some matters not of spiritual cognizance and which therefore were not legally the subject of presentment. See 1 Vent. 114, 127. 2 Kebl. 771. 3 Kebl. 206, 229. Hardr.

364. For an historical account of the contests respecting the form of oath administered to churchwardens, see Gibson's *Codex*, tit. 42, ch. 3. 1 Burn's *Ecc. Law.* 404, 8th ed.

( C. 337. ) SMITH v. TRACY.—*Hil.* 1676. B. R.

*S. C.* 1 Vent. 307, 316, 323. 2 Vent. 317. T. Jo. 93. 2 Lev. 173. 1 Mod. 209. 2 Mod. 204. 3 Keb. 601, 620, 669, 730, 776, 806, 831.

THE question was, whether a brother of the half blood should have distribution within the new statute? and it was argued by *Holt* that he should; and by Mr. *Solicitor* that he should not. *Et adjournatur*. And *Twisden* cited one *Browne's* case in the Delegates, where it was \* adjudged, that administration should be granted to the whole blood, which should be preferred before the half blood. *Post*, Case 345. [p. 294.]

[ \* 289 ]

( C. 388. )

NOTE:—This difference was taken by *Saunders*, viz. that if a lessee for years, as executor, purchase the reversion, this shall extinguish the term, because it is his own act; but if one that hath a reversion be made executor, and hath a term that way, that shall not be an extinguishment, because the term and the reversion are conjoined by act in law. [1 Roll. 934.](a).

If one, who has a term of years as executor, purchases the reversion, the term is extinguished: *aliter*, if the reversioner acquire the term by executorship. *Per Saunders.*

(a) *Post*, p. 384, 512. The difference here taken is agreeable to the general rule laid down by Mr. Preston in his treatise on the law of merger, viz. that when the two estates are held in different rights and the one is an accession to the other by the act of law, there will be no

merger: but that whenever the accession is occasioned by an act of the party, a merger will be the consequence; see 3 Prest. Conv. p. 273, 299, 309, &c. where the subject is discussed and the cases collected and examined.

BARTON'S CASE.—*Pasch.* 1677. B. R.

( C. 339. )

*S. C. ante*, p. 286.

THIS case came now to be argued upon a demurrer to the prohibition; and for as much as it appeared by the suggestion, that the executors had consented to take as legatees; that by this means the property vested in them as legatees, and was altered from what it was when they were executors; for when they were executors, one might have granted away all the goods, but now one can grant but a moiety; and when a certain thing, as a horse, or a cow, &c. is devised, as soon as the executor assents, the property vests in the legatee, and he may have an action at common law for the recovery of the thing; and therefore differs from the case in 2 Roll. 301; for that was for a legacy, for which the common law can give no remedy; and that is given as the reason of the case: And the Court inclined for that reason to continue the prohibition. The books cited were Cro. Eliz. 511. Co. Entr. 506. 2 Cro. 206. Moore, 915. 2 Co. 45. Bro. Devise, 6.

A. leaves a legacy to B. & C. his executors, between them: they consent to take as legatees, and B. dies: *semb.* B.'s husband shall be prohibited from suing in the Ecclesiastical Court for her moiety (a).

After the assent of the executor to a specific legacy, the legatee may sue for it at law (b).

(a) 18 Viner, 4. *Doe v. Guy*, 3 East, 126. *Gould v. Gapper*, 5 East, 366. *S. C.* 4 Espin. 154. *Gorton v. Dyson*, Gow. Rep. 78. *Ante*, p. 66.

(b) *Acc. Doe v. Guy*, 3 East, 126.

( C. 340. )

*Semb. S. C.* 1 Vent. 308.

A PROHIBITION was prayed, because the parties were sued for rates to the repairs of the church, and suggested that some of the parishioners were rated, and others were never rated at all: but the Court would not hearken to it; for they said, if they were grieved, they might appeal; and it was proper for the examination of that Court, for church-rates were not suable for at the common law (a); and they having consueance of the principal, might examine the equality of the rates as incidental.

No prohibition to a suit for church rates, because they are unequal. 2 Cro. 234. Yelv. 172. 2 Roll. Ab. 290-1.

(a) See Gibs. Codex, tit. 9, ch. 4. Where the validity of the rate is not disputed, summary remedies have since been provided for the recovery of it. See 53 Geo. 3, c. 127, and other statutes mentioned in 1 Burn's Ecc. Law, 386, 387-8, Tyrwhitt's edit. *Rex v. Chapel-wardens of Mithrow*, 5 Maul. & Selw. p. 252.

( C. 341. )

Trin. 1677. C. B.

No prohibition will issue to the Spiritual Court for citing churchwardens, after the expiration of their year of office, to make a presentment by virtue of their oath of office. See *Selby's case*, *post*, p. 298. 2 Vent. 41.

THE churchwardens of ——— after their year was expired, were cited into the Spiritual Court to make a presentment *per vim juramenti*, which they had taken as churchwardens; and they present one Ford for not coming to church; and Ford, being cited for this into the Spiritual Court, prayed a prohibition.

It was urged for a prohibition, that this cause was all one as if the Judge had cited a person to appear *ex officio* (a); because here he brings in a person by a side wind to present *per vim juramenti*, when his office and the acting upon his oath were determined; for he was to act upon his oath no longer than he continued in his office; and the cases cited on this side were *Harding v. Ireland*, in this Court, Mich. 26 Car. 2. Rot. 536. 12 Co. 27. Hetly, 61. Hob. 247. *Watt's case*, Cro. Eliz. 201. Moor, 907, 42. 1 Leon. 177. 2 Rolle, 107. And Judge *Atkins* was of opinion that a prohibition ought to be granted.

But *North*, *Windham*, and *Scroggs* were against the prohibition; for,

No prohibition shall issue for irregularity in the proceedings of the Spiritual Court, in a matter of spiritual cognizance.

*Ante*, C. 329, 332, 333.

The Spiritual Court may try a matter determinable at common law, if it arises incidentally in a matter of spiritual cognizance: but they must try it according to the rules of common law. *Ante*, p. 129. C. 340. Carth. 142-3. Cowper, 424.

[ \* 291 ]

5 East, 363-4. Com. Dig. Prohibition, G. 23. Bull. N. P. 219.

1. Where the matter is wholly of ecclesiastical cognisance, there, though they do proceed irregularly, no prohibition shall be granted; but the party ought to have his remedy by way of appeal. And here this presentment, though it be after the party is out of his office, yet whether this may not be by their rules and canons *non constat* to this Court.

2. Where a matter is of ecclesiastical cognisance, if a matter determinable at common law intervene, they shall try that, except it be in case of a *modus*, which by the law they cannot try; as if a legacy be sued, and a release pleaded, they shall try this release; but then it must be with this difference—

That when they try an incident matter determinable at common law, by reason of their jurisdiction in the principal matter, there they shall be tied up to the rules of the common law; as in the case, if a release be pleaded to a legacy, and there be but one witness, or else the witnesses dead, and they will not admit of proving hands, nor allow one witness for a proof, they shall be prohibited; for although those matters come under their cognisance as incidents, yet being matters originally of temporal cognisance, they shall go according to the rules of common law.

And it was said by *North*, and acknowledged by *Atkins*, that as suits may be commenced in the Spiritual Court by presentments of officers upon oath, so there may be voluntary promoters, and such suits are allowed; for then, if the matter be not made out, or at least a probable matter, the party that is sued shall have costs against such promoter; and he cited *Clarke's Praxis* [tit. 322], which he commended for a pretty book; and so if this suit was not well commenced

there by the promoter as an officer, yet he shall be taken as a voluntary promoter; (but *Atkins* said, they could not be so understood here, because it appears that they compelled him to present,) and so the matter being of ecclesiastical cognisance, the regularity of their proceedings is not examinable in this Court; and if they proceed irregularly it must be remedied by appeal; and so the prohibition was denied. Authorities cited, Lat. 228. Hob. 188. 2 Roll. 318.

SMITH *v.* WOTTON.—C. B.

( C. 342. )

THE plaintiff, being a feme covert, sued the defendant in the Spiritual Court *pro reformatione morum*, for saying to J. S. that the plaintiff "was a whore, and a common whore, and he knew her to be a whore."

A feme covert may sue alone in the Spiritual Court for defamation, and the husband's release is no bar: *aliter*, if the suit is for a legacy or other duty. Acc. 2 Rol. Ab. 301, pl. 12. Cro. Car. 222. 18 Viner, 4. 5 East, 366.

It was suggested for a prohibition, that the husband of the plaintiff had given a release to the defendant in the Ecclesiastical Court. To that this difference was taken *per Curiam*,

That where the wife sueth for a duty as a legacy, &c. there the husband's release is a good bar, and if they refuse to allow it, a prohibition shall go: but here it being *pro reformatione morum*, the feme may sue alone, and the baron's release is no bar (a).

Then it was alleged for a prohibition, that these were but words of heat and passion, to call a woman whore, and so they ought to be prohibited. To that this difference was taken *per Curiam*,

Mere words of heat, or of general accusation, are not punishable by the Spiritual Courts. *Ante*, p. 43-4. *Post*, Case 347, 347 b. 350, 353, 362. 2 Term Rep. 473.

That if one called another whore, this was but a passionate expression, and no suit should be for it in the Ecclesiastical Court; but if it did charge her particularly that she was naught with such a one, or that she was such a one's whore, there they might sue in the Ecclesiastical Court: and here \*it is said, that he knew her to be a whore, which is a particular charge.

[ \* 292 ]

But here another thing is, that the words were not spoken to the party herself, and so cannot be intended words of heat and passion, being spoken to a third person; and the Court granted no prohibition.

(a) But he may release the costs, 2 Rol. Ab. 300, pl. 10. 3 Bulstr. 264. Cro. Car. 222; unless the parties were divorced, and the wife have alimony. *Chamberlain v. Hewitson*, 1 Ld. Raym. 73-4. S. C. 1 Salk. 115. 18 Viner, 3, 4.

STEEDE *v.* BERRIER.—C. B.

( C. 343. )

S. C. 2 Lev. 243. 1 Vent. 341. T. Jo. 135. 1 Mod. 267. 2 Mod. 313. 3 Keb. 845. 2 Show. 63. T. Ray. 408. Pollexf. 546.

A MAN devises to his son Robert, and at the time when the will is made he hath a son Robert, and a grandson Robert; the son Robert dies before the testator, who after the death of his son new publisheth his will, and declares by parol that his grandson should have those lands which were devised to his son, and dies.

A man, having both a son and grandson named Robert, devises land "to his son Robert;" the son dies, and afterwards the devi-



or re-publishes his will, and declares by parol that his grandson shall have the land: Held, that the grandson shall take under the devise. *Scroggs, J. diss. Ante, C. 287.*

Under a devise "to his son R." a grandson of the deviser of that name shall take, if he has no son. 1 Vent. 342. T. Ray. 411-12. 8 Vin. 319. 2 Sid. 149.

Under a devise of "all his lands in D." after purchased lands will pass if the will be republished. *Ante, C. 287. Cro. Eliz. 493. Bac. Law Tr. p. 79. 1 Sal. 238. 1 Saund. 277, n. (4).*

Parol averments are admissible in wills to ascertain the person, but not to alter the estate.

[ \* 293 ]

Under a devise "to A. and his heirs," the heirs take nothing, if A. dies before the deviser (c).

Annexing a codicil amounts to a re-publication. *Semb. (d).*

The question was, whether by virtue of this parol declaration the grandson shall take what was devised to the son? in this case it was agreed,

1. That if a man hath Robert a grandson, and no son, and he deviseth to his son Robert, that the grandson should take, for he is a son, though it be with an addition of grand (a): and the statute concerning the poor, that declares that parents shall maintain their children, is constantly extended to grandsons.

2. That if A. deviseth all his lands in D. and after purchaseth more lands, there, if he after that new publish his will, those new purchased lands shall pass. *Vide Plowd. Com. Bret v. Rigdon.*

But it was said, that this case is not at all alike to either of those cases; for here was a son that did take by the will at the time when the will was made, so that it cannot be thought that he then intended his grandson Robert, because he had a son Robert to take; and then it would be very strange (as was objected) that a new publication should make another person to take, than did at the time when the will was made.

But to this point *North* and *Atkins* were of opinion that he should take by virtue of this parol declaration and the will together, for *Quæ non prosunt singula juncta juvant.* [43 Ed. 3. 31. Dy. 142. Cro. Eliz. 493.] And though a parol averment shall not be admitted to explain a will, so as to expound it contrary to the import of the words, yet when the words will bear it, a parol averment may be admitted, as 5 Co. 68, to ascertain the person, but in no case to alter the estate (b).

\* But *Windham* and *Scroggs* inclined contrary; because *per stat.* lands cannot pass by a will but in writing; and then how this parol declaration should give it to a person that could not take by the will in writing they did not conceive.

For it was agreed by all, that if lands be devised to A. and his heirs, and A. dies before the testator, that his heirs shall take nothing, for "Heirs" is a word of limitation, and not of purchase.

And they did seem to agree, that annexing of a codicil did amount to a new publication, Cro. Eliz. 493. *Et postea fuit adjudge*, that the grandson shall take by the devise, *contra opinionem Scroggs (e).*

(a) *Earl of Orford v. Churchill*, 8 Ves. & Bea. 59.

(b) On the admissibility of parol evidence to explain wills, see *Viner Ab. Devise, (G), a. (G), a. 2.* 1 Philipps's Evidence, Part 1, ch. x, § 1, 2, 4th edit. 2 Thomas's Co. Litt. 646-7, note B. *Doe v. Westlake*, 4 Barn. & Ald. 57.

(c) *Goodright v. Wright*, 1 P. Williams. 397. *Hodgson v. Ambrose*, Dougl. 337. *Doe v. Kett*, 4 Term Rep. 601.

(d) And now a codicil executed agree-

ably to the stat. of frauds will have the same effect; see *Acherley v. Vernon*, Com. Rep. 381. 1 Saund. 277 d. note. *Goodtitle v. Meredith*, 2 Maul. & Sel. 5. although a different opinion formerly prevailed.

(e) The judgment was reversed in the K. B. on error, *Scroggs* having become C. J. there in the mean time. See post, p. 477. and the report of S. C. in *Polluxfen*. 8 Viner, 163. 2 Vernon, 545, in notes.



GYNES v. KEMSLEY.

( C. 344. )

A. DEVISETH to B. and C. brothers, several parcels, and if either die, that the other should be his heir: the question was, whether or no, when B. died, C. should have the fee, or only an estate for life? and to that this diversity was taken, that when a fee was devised to A. that if A. died, B. should be his heir, there B. should have a fee; but when A. had but an estate for life by the devise, there B. should take but for life by way of executory devise. Hob. 75. 1 Rolle, 836.

A. devises several parcels to B. & C. two brothers, "and if either die, that the other shall be his heir:"

Semb. upon the death of B., C. shall take only an estate for life. Viner Ab. Dev. U. a. Pollexf. 485.

A devise to Margaret, daughter of W. K. is good, although her name was Margery. Acc. Finch Rep. 403. Viner Ab. Devise, T. b. 3 Leon. 18-9. 7 East, 299. 3 Taunt. 156-7.

But Serjeant *Maynard* said, that when the case is betwixt brothers, there these words may pass an inheritance, because they by intendment may be heirs to one another; but if the case were betwixt strangers, there, to say that the other shall be his heir, is no more than to say that he shall have the estate which the other had: but the Court inclined that C. should take but an estate for life. *Sed adjournatur*.

2. Another point was, here was a devise to Margaret, the daughter of William Kemsley, and her name was Margery, whether she should take? and held that she should; *quia constat de persona* by the description. 11 Co. 21.

(C. 344 b.)

PER *North*, Chief Justice.—The law is clear now, that a devise to an infant *en ventre sa mere* is good enough, though he be born after the death of the testator, and he shall take by way of executory devise when he is born. *Vid.* 1 Roll. 730.

A devise to an infant *en ventre sa mere* is good. *Ante*, p. 244-5. Butl. Fearn. p. 535.

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SMITH v. TRACY.—*Mich.* 1677. *Pasch.* 28 Car. 2. Rot. 533.

*S. C. ante*, p. 288-9.

( C. 345. )

It was now resolved *per Curiam* that the brother of the half blood should have his share in the distribution, and was intitled to it equally with the brother of the whole blood. And the Chief Justice cited Sir *George Sands's* case in the Delegates, where it was resolved, that the brother of the half blood was next of kin to have administration; and so they said it had been held, that a brother of the half blood was next of kin to be guardian in socage (a).

The half blood is equally entitled to distribution and administration with the whole blood. 2 Freem. 95, 112. 2 Bl. Com. 505. Carth. 51. 1 Ves. Senr. 156.

A brother of the half blood may be guardian in socage.

(a) *Vid.* *S. C.* 1 Vent. 323. *Swan's* case, Rol. Ab. Gardeln. (O), pl. 6. Cro. El. 825. *Sadler v. Draper*, T. Jo. 17.

14 Viner, 178. *Sed vid.* Co. Lit. 88 b. and note (5), *ibid.* by Hargrave.

ENDIKE v. STEED.—C. B.

( C. 346. )

*S. C. Mendyke v. Stint*, 2 Mod. 271. 3 Keb. 881, 849.

AN *indebitatus assumpsit* was brought in the Sheriff's Court in London, for nursing a child in *le Ward de Cheap*, &c.

The defendant pleaded *non assumpsit*, and a verdict was there found for the plaintiff.

And now a prohibition was moved for upon a suggestion,

After a verdict against the defendant in an inferior court, for a cause of action alleged to have arisen

within its jurisdiction, no prohibition lies upon a suggestion that it arose out of it.

that the child was nursed at Fulham *extra jurisdictionem Curiae*.

And the sole question was, whether now, after a verdict, (when the party had admitted the jurisdiction by pleading, and had stood trial), it was not too late to come for a prohibition?

And it was argued by *Pemberton* for the prohibition; and he said it is the duty of those great Courts to keep inferior jurisdictions within their limits, whether they be temporal or spiritual; and they may do it upon the suggestion of the party, or of a stranger, by a prohibition, or by a *Quo warranto*. 2 H. 4, 10.

Post, p. 323.

*Obj.* Here it is after a verdict; and now it is found by the jury to be within the jurisdiction of the Court; and so the party is estopped to say the contrary.

*Ans.* It being a transitory action, the finding of the jury as to place is not material, unless it had been put in issue; and besides, the matter arising out of their jurisdiction, all their proceedings are *coram non judice*, and so void; and he cited 2 Inst. 601. 2 Rolle, 317, 318. N. Br. 45. M.

[ \* 295 ]

\* On the other side it was argued, that after verdict prohibitions have been commonly denied. 1 Roll. 810. 2 Inst. 230. Style, 45. Kelw. 106. 12 Co. 77, 78. 2 Roll. 318.

Where it appears on the proceedings, that the inferior Court has no jurisdiction; or where, from the nature of the cause, it can have no consueance; a prohibition lies at any time. But where the want of jurisdiction is by reason of time or place, the defendant below must plead it. *Maynard arguendo agr. per Curiam*. Lutw. 1567-8. *Ib.* 1023-6. Post, C. 353, 358.

And *Maynard*, who argued against the prohibition, took this difference, that where it appears in the declaration or libel, &c. that the court hath no jurisdiction, there a prohibition may be granted at any time; and so likewise where the cause is of that nature, that the inferior court can have no consueance of it, there a prohibition may be had at any time; but when, by reason of some circumstance of time or place, the Court hath not jurisdiction, there the party ought to plead it, or else he shall not have advantage of it. 2 Cro. 421.

But all the Judges (except *Scroggs*) inclined for the prohibition; for they said the king is concerned, and it is an incroachment upon his Courts; and it is not in the power of the party, by his admittance, to give a jurisdiction.

*Term. Hil. 1677.* The case of *Endike* and *Steed* being argued again, the Court refused to grant a prohibition, in as much as the party had neglected to plead to the jurisdiction, or to move for a prohibition, till after verdict and judgment; and they agreed the differences taken by *Maynard supra* (a).

(a) See *ante*, C. 95, note (a). *Squib v. Holt*, *ante*, p. 193. *Stainton v. Randal*, p. 260. *Higginson v. Martin*, p. 322. Buller, Ni. Pri. p. 219. Com. Dig. Prohibition, (D). 8 Mod. 194. R. T. Hardw. 317. 3 Term Rep. 3, 5. But although the party who neglects to plead in such a case can have no remedy by prohibition yet the plaintiff below cannot justify in an action of trespass, if the cause of action

in fact arose out of the inferior jurisdiction, see note to *Stainton v. Randal*, *ante*. And when the defendant below, intending to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, &c. or if his plea be not accepted or be overruled, a prohibition will lie at any time. 2 Mod. 273. Com. Dig. Courts, P. 15.

*Trin.* 1678. C. B.

( C. 347. )

A LIBEL in the Spiritual Court for these words, "thou art the son of a whore, and thy mother stood in a white sheet for a bastard," or words to that effect.

General words of heat and passion not punishable in the Spiritual Court. *Ante*, C. 342, and *post*, C. 347 b. 350.

*Seise* moved for a prohibition, because these are only words of heat and passion. But to that the Court answered, that if it had been only for the first words, viz. "thou art the son of a whore," these would have been only words of heat, but here he comes to particulars, viz. "stood in a white sheet." 2 Roll. Rep. 433.

Then it was moved, that here is not a positive affirmation in the libel of speaking the words, but these, *or words to that effect*. But to that the Court answered, that that was their usual form in the Spiritual Court; and so for time they say, in the months of January, February, &c. all the months of the year.

No prohibition lies for the generality of the libel in the Spiritual Court, if it be in the usual form. *Ante*, C. 329, 332. Hardr. 364. 1 Stra. 484.

But *Atkins* inclined that that was naught: but all the rest *contra*; and so they would grant no prohibition.

[ 296 ]  
(C. 347 b.)

THE next day in the King's Bench a prohibition was granted, where the libel was by a woman for calling her "whore," because only a word of heat and passion. *Vide* 2 Rol. Rep. 433.

Prohibition granted, where a woman libelled for calling her a whore. *Vid. ante*, p. 43.

*Note*, That it was a question in the King's Bench, that if a man be sued in the Spiritual Court for calling another "bastard," if he comes and suggests that he is heir to lands, whether he may not have a prohibition, because then the words are actionable at common law(a)? The Judges differed.

*Quære*, whether prohibition lies to a suit in the Spiritual Court for calling an heir a bastard?

*Wylde*:—He may be sued in both Courts, for one is *pro reformatione morum*, and the other for damages to the party.

The other two Judges inclined *contra*.

(a) 2 Rol. Ab. 292. *Vaughan v. Ellis*, Act. for Defamat. D. 11, 12. *Savile v. Cro. Jac.* 213. *Turner v. Sterling*, 2 *Roberts*, 1 Ld. Ray. 379. *Ventr.* 28. *S. C. ante*, p. 16. Com. Dig.

FARMER v. BROWNE.—*Trin.* 1679. B. R.

( C. 348. )

*S. C.* 2 Lev. 247. 1 Vent. 339. T. Jo. 122. 3 Keb. 802, 819.

THE defendant, being churchwarden, libelled against the plaintiff in the Ecclesiastical Court for the repairs of the church. The plaintiff being a quaker (a) refused to answer upon oath, and thereupon the Court proceeded against him to excommunication; the plaintiff came here and prayed a prohibition; and the only question was, whether or no they could compel a man, in that Court, to answer upon oath in any causes besides matters testamentary and matrimonial.

A party libelled in the Ecclesiastical Court for the repairs of a church, is compellable to answer upon oath: *Aliter*, in criminal matters.

And after many arguments it was held that they might in this case, which was a spiritual cause, and is particularised

(a) See now 22 Geo. 2, ch. 46. as to the oaths of Quakers.

2 Inst. 489.

in the statute of *Circumspecte agatis* among the *merè spiritualia* (b).

But it was said, that they ought not to make a man answer upon oath, so as to accuse himself in any thing criminal (c). And the Court granted a consultation.

(b) Acc. 3 Black. Comm. 446-7. *Goulson v. Wainwright*, 1 Sid. 374. Com. Dig. Prohibition, F. 6, G. 13. Ib. Serement, B. 2 Gibs. Codex, tit. 44, ch. 4, in the note to stat. 16 Car. 1, ch. 2.

(c) See the authorities in the last note, and *ante*, C. 326. *Weeks's case*, 2 Mod. 278. Stat. 13 Car. 2, c. 12. 2 Inst. 657, 658.

( C. 349. )

CARTER v. CRAWLEY.—*Trin.* 1679. C. B.S. C. T. Raym. 496. *Post*, C. 352-4.

(1) 22 & 23 Car.  
[ \* 297 ]  
2, c. 10.

A. HAD two aunts, one whereof died before him, and left children; A. died intestate, and administration was granted to the surviving aunt (being the nearest of kin); the other aunt's children sue for distribution, and obtain it in the Ecclesiastical Court; whereupon this Court granted a prohibition; for by the proviso in the act (1) representatives shall not extend farther than to brothers' and sisters' children.

( C. 350. )

MOORE v. NEWMAN.

*Ante*, C. 342.  
347.

2 Roll. 297.  
Cro. Car. 97.

"THOU art an old whore and bawd, and didst play the whore with thy lodgers, and wentest to London to play the whore with the clerks there." A prohibition was prayed, alleging that these were words of heat. 2 Rol. 296. But the Court were of opinion that these were actionable in the Spiritual Court, by reason of the words, "thou didst lie with thy lodgers," which is a particular charge. And thereupon a consultation was prayed; but the prohibition being executed, the Court could not grant a consultation; but the party must demur to the suggestion; and afterwards a consultation was granted.

( C. 351. )

WILDBOW v. DAWSON. *Sur le volunt de Tunstall.*

No prohibition lies for granting probate of a nuncupative will not made agreeably to stat. frauds. *North*, C. J. dissent. *Ante*, p. 290.

A. PROHIBITION was prayed to the Ecclesiastical Court, because they did suffer the probate of a nuncupative will, when as the testator did not bid three witnesses take notice according to the act. *North*, Ch. J.—That a prohibition shall be granted, because they proceed contrary to the act. But the other three Justices *contra*; because they have proper jurisdiction of the probate of wills, and if they proceed not according to their rules, the party ought to appeal.

( C. 352. )

CARTER v. CRAWLEY.—*Trin.* 1680. C. B.S. C. *ante*, C. 349. *Post*, C. 354.

THIS case coming now to be argued, the Court was divided in their opinions.

*North* and *Charlton* being for the prohibition, by reason they thought that aunts, and the children of aunts, were not within the statute to have distribution. But *Windham* and *Ellis* *e contra*; for they apprehended, that they were within the reason and meaning of the statute.

But *North* said, that the grandchildren of brothers and sisters shall have administration before the children of uncles and aunts, and yet such grandchildren shall not have distribution. *Adjournatur*; the Court being divided.

( C. 353. )

A suggestion was made, that the defendant libelled in the Ecclesiastical Court for saying "She did play the whore with J. S." and it was suggested, that the words were spoken in London, where by the custom they were actionable.

After sentence in the Ecclesiastical Court for defamation, no prohibition lies on a suggestion that the words are actionable by a particular custom (as in London): *aliter*, if the words are actionable at common law. *Ante*, p. 295.

This difference was taken, viz. That if a man be libelled for words in the Spiritual Court, that are actionable at the common law, there a prohibition shall be granted after sentence, as well as before; because they are bound to take notice of the common law; but here these words being actionable by a particular custom, the party ought to have come before sentence, for otherwise they are not bound to take notice (a).

It was said, that one reason why they shall be prohibited for words that are actionable at common law is, because otherwise the party might be twice punished (b).

(a) On prohibitions in suits for words spoken in *London*, &c. see 1 Lev. 116. Lutw. 1040-3. 1 Ld. Ray. 711. 1 Stra. 187-8, 545, 555. 8 Mod. 176, 114. Bunb. 312. 4 Burr. 2032, 2039, 2040, 2418. 1 Wils. 62. R. T. Hardw. 392. Dougl. 380 n. 2 Burn's Ecc. Law. 134-5, Tyrwhitt's edit.

was said that a sentence in the Spiritual Court would be no bar to an action in London for the same words. *Hawkins v. Cook*, Carth. 213. There are many instances in which the Temporal and Spiritual Courts have a concurrent jurisdiction; see Bac. Abr. Prohibition, (L), 5. 2 Glbs. Codex, tit. 45, ch. 5. *Ante*, p. 66, and C. 347 b.

(b) In a case similar to the above, it

CARTER v. CRAWLEY.—*Hil.* 1680.

( C. 354. )

*S. C. ante*, C. 349, 352.

THIS case came now to be argued again. And *Seise* argued that a prohibition should go, and cited 31 E. 3, Cotton, p. 40. *West* argued against the prohibition, that distribution ought to be to the children of the other aunt, and cited Hob. 88. *Slawney's* case.

*North* was for the prohibition, and *Charlton* and *Windham* against it. *Adjournatur* (a).

Under the Stat. of Distributions, no representation is admitted among collaterals beyond the children of the intestate's brothers and sisters. 2 Bl. Com. 515. *Post*, C. 355.

(a) The divided opinions of the Court, and the result are mentioned by counsel in 1 Ld. Raym. 572-3. The marginal abstract above is agreeable to the opinion of Lord C. J. North, which was confirmed in *Pett's* case, 1 Ld. Ray. 571. 1

P. Willms. 25. and see 2 Show. 286. 1 P. Willms. 594. 4 Burn's Ecc. Law, 420-1-2-3-4, Tyrwhitt's edit. The argument of Ld. North, reported by Sir T. Raymond, is very full and instructive.

## ( C. 355. )

## IN SCACCARIO.

The children of a deceased cousin-german shall not have a distributive share with another cousin-german. *Ante*, C. 354. 11 Vin. 193.

A PROHIBITION was prayed to the Ecclesiastical Court, where a person died intestate, and his next relation was a cousin-german; and the children of another cousin-german sued for distribution. And *per tot' Cur'* the prohibition was granted upon the new act of parliament of this king.

## ( C. 356. )

## SELBY'S CASE.

A churchwarden is not compelled by the Ecclesiastical Court to present a delinquent. [ \* 299 ]

A PROHIBITION was prayed to the archdeacon of Exeter, because he proceeded to excommunicate the plaintiff, for that he being churchwarden refused to present a notorious delinquent, being admonished. And a prohibition was granted; for they are not to direct the churchwarden to present at their pleasure. But if one churchwarden doth refuse to present, he may be presented by his successor. 13 Rep. 5 (a).

(a) But see *ante*, p. 290; and the Directions to Churchward. § 4, 5, 6, 7. Canons, 26, 115-6-7, cited in Prideaux's 4 Burn's Ec. Law, p. 26, 27.

## ( C. 357. )

STAR v. ELLYOT.—*Mich.* 1680.

Lands formerly belonging to the priors of St. John of Jerusalem are discharged of tithes.

A PROHIBITION was granted to stay a suit for tithes in the Ecclesiastical Court, upon a suggestion, that the lands were part of the possessions of the priory of St. John's of Jerusalem, and so discharged by stat. 32 H. 8, (c. 24). And though there be difference of opinions in the books, yet the later judgments are, that they are discharged. *Whitton v. Weston*, Jones, 182. Godb. 391. Latch, 89. 2 Cro (a).

(a) Acc. *Fosset v. Franklin*, T. Ray. 225. *Hanson v. Fielding*, Bunb. 214.

## ( C. 358. )

## NEWMAN and Ux' v. MOORE.

Where a party is cited out of his diocese, no prohibition lies after sentence. Carth. 33. 2 Salk. 548. 18 Viner, 51. Gibson's Codex. tit. 44, c. 2, notes on the statute. 1 Addams Rep. 5. 1 Hagg. Rep. 6.

THE plaintiff lived in Rochester diocese, and was cited into the Arches, and prayed a prohibition upon the statute of 32 H. 8, [23 H. 8, c. 9?] after sentence there; and the question was, whether a prohibition should be granted after sentence in this case? The cases cited were 12 Co. 77. Cro. Eliz. 97. Rolle, Prohibition. Cro. Eliz. *Gatton's case*.

If the party be drawn *ad aliud examen*, a prohibition may go at any time. But where the Court hath consueance of the matter, and the party will attend and plead, and put the party to charges, there he shall not have a prohibition after sentence: [*Ante*, C. 95, C. 346]: *Per Windham* and *Charlton*. Consultation granted.

( C. 359. ) MOYLE v. THE CHURCHWARDENS OF ST. CLEMENTS.—*Pasch.* 1681. C. B.

Prohibition denied to a suit in the Ecclesiastical Court for a

A LIBEL in the Ecclesiastical Court for a tax to rebuild St. Clement's Church. The cases cited for the churchwardens were 5 Co. *Jefferie's case*. Register, 44. *Lutterell's case*, 5



Co. Poph. 197. 2 Roll. 289. Brownl. 225, *e contra*. *Nul* tax to rebuild a church. 1 Mod. 236. 2 Mod. 222. 189. Parker, 82. Antiq. Eccl. Brit. Winch, 63. 2 Inst. 489. 1 Burn. Ecc. L. 357-8, 8th edit. 5 Co. *Spencer's case*, Rol. Rep. 247.

\* *Per tot' Cur'*:—No prohibition, because it is a matter of Ecclesiastical conusance; and if there be any injustice, it is proper to appeal; and the rate coming to 6000*l.* though it falls hard upon the tenant (a), yet that cannot be helped, if he hath not provided against it in his covenants; and it is a thing of necessity to rebuild the church; and though the foundation be larger, yet no man hath reason to complain but the parson.

(a) *Anonym.* 4 Mod. 148.

*Trin.* 1681.—C. B.

( C. 360. )

A LIBEL in the Ecclesiastical Court of Hereford against the parson impropriate, to repair the chancel of Bradwarden.

A suit against an impropriator for the repairs of a chancel was prohibited, upon suggestion of the prescriptive liability of another person. 1 Gibs. Codex, tit. 9, c. 5.

Upon a suggestion, that one J. S. had a seat there time out of mind for him and his family, and privilege of burial there, and that he time out of mind had used to repair the chancel, a prohibition was granted, because this is a prescription triable at common law.

STOKES *v.* TROLLOP.

( C. 361. )

A PROHIBITION was granted in a suit in the Consistory Court at Exeter for a mortuary, upon a suggestion that time out of mind no mortuary had been paid; because this custom is triable at common law.

Suit for a mortuary prohibited, where by custom none was due. 3 Mod. 268. Lutw. 1069., Com. Dig. Prohibition, G. 11.

LODGE *v.* YATES.

*S. C.* 3 Lev. 18.

( C. 362. )

THE plaintiff spoke of the defendant these words, "Yates is a lying fellow, and hath lain with all the women between H. and B., and lies with so many women that he scarce lies with his wife." The plaintiff was sued for these words in the Ecclesiastical Court. A prohibition was prayed, because these words import a thing impossible, and are too general.

Prohibition denied in a suit for words importing adultery.

But denied *per Curiam*, because they import him to be an adulterer; and this is a matter properly in the conusance of the Ecclesiastical Court.

[ 301 ]

WEEKS *v.* OXENDON.

( C. 363. )

THE plaintiff, being sued in the Ecclesiastical Court for repairs of the church, suggested, that he had built an isle, and repaired it at his own charges, and moved for a prohibition.

*Semb.* Building and repairing an isle will not exonerate any one from the

*Cur'*:—Unless it be suggested, that he sits in the isle, and

repairs of the church, unless he sits in the aisle and has no benefit of the nave.

hath no benefit of the *navis ecclesiæ*, there is no cause for a prohibition; for a man may build an aisle for his conveniency.

## IN CURIA CANCELLARIÆ.

[NOTE.—For the comments, references and marginal abstracts which accompany the Cases in Chancery reported in the thirteen following pages, the reader is indebted to Mr. HOVENDEX, who has already introduced them in the Appendix to the 2d edition of the 2d part of Freeman's Reports.—Editor].

### ( C. 364. )

Limitation of suits in Equity.

AN original trust is not barred by the statute of limitations (a); but for other actions, which are within the statute, there is no remedy in equity. Mar. 129. *Et cest difference jeo au-divi devant.*

(a) *Vide* 2 Freem. p. 156, 2d edit. C. 201, and 202. But see the references in note (3), to the first of these cited cases; to which add "*Cholmondeley v. Clinton*, 2 Jac. & Walk. 163, *et seq. pag.*"

### (C. 364 b.)

The heir may be relieved against the executor in case of assets.  
2 Inst. 441.

A MAN binds himself and his heirs, &c. in an obligation; if the heir be sued, and the executor have assets, the heir may be relieved here against the executor (a).

(a) *Vid.* 2 Freem. C. 266, p. 138, notes (2) and (3), in the 2d edit. and C. 278 c. p. 205, *ibid.*

### ( C. 365. )

Construction of the word "survivors," in a will.

*Mich.* 1673.

A. HATH three daughters, and deviseth them 300*l.* a-piece, to be paid at the age of twenty-one years, or day of marriage, which should first happen, and if either of them should die before the said times, then her portion to be equally divided between the survivors; the eldest marries and hath her portion, and dies leaving issue; the youngest dies before she either is married, or attains the said age of twenty-one; the second survives.

[ \* 302 ]

\* The question was, whether the second, surviving, should have all the portion of the youngest, or whether the children of the eldest should have a share?

Resolved *per Ellis, Wyndham*, and *Dom' Cancellor*, that the second sister should have the whole (a); and though it was objected, that the words ("equally to be divided") did imply that they should be sharers, yet that is to be understood *reddendo singula singulis* in case two of them had survived.

(a) *Milson v. Audry*, 5 Ves. 468. But see *Wilmot v. Wilmot*, 8 Ves. 12. *Barlow v. Salter*, 17 Ves. 482, that the word "survivors," has been frequently construed to mean "others," so as to give a vested interest, descendible to representatives.

( C. 366. )

MR. Wentworth of Lincoln's Inn, being to release his interest in a parcel of land, the release was so penned that it extended to release his interest in almost 2,000*l. per annum*, which he did not intend; and he had relief in Chancery (a).

Equity relieves against fraud or mistake.

(a) To rectify mistakes is the peculiar province of the Court of Chancery; *Finch v. Fisch*, 1 Ves. junr. 545; and though Courts of common law have a concurrent jurisdiction, where fraud in obtaining a deed is clearly established; and will relieve by making void an in-

strument so obtained; yet this is one of the most antient heads of equitable jurisdiction; where the remedy is, in many cases, more effectual than can be had at law. *Pickett v. Loggon*, 14 Ves. 234. C. 226, p. 173. 2 Freem. 2d edit.

CHEEKE and THE LORD LISLE.—*Hil.* 1673.

( C. 367. )

*S. C. Rep. temp. Finch*, 98; and see the case, on a trial at law in ejectment, 2 Keb. 794.

UPON the marriage of the plaintiff with the daughter of the defendant, it was agreed by articles under hand and seal, that the plaintiff should have 4000*l.* to be paid in this manner, viz. 1500*l.* presently, and 2500*l.* within six months after he had made a jointure of 800*l. per annum*, (which by the articles he was to do within the space of four years,) and it was likewise agreed, that if her husband died before the money paid, then it was to be paid to the wife. It fell out, that she died within a month after she was married, the jointure not being paid according to the articles. The question was, (seeing that the law was against the plaintiff), the jointure not being made, and he not being to have the portion till after the jointure made, whether here were any circumstances of weight enough to prevail for a decree to enforce the defendant to pay this money, being in strictness of law not bound to pay it, and the wife dying so suddenly after marriage? *Curia advisare vult.* [Continued, *post*, p. 308.]

Where, by contract, a settlement is a precedent condition to payment of a portion, if the wife die before settlement made, the husband can have no relief in Equity as to the portion.

By *Reg. Lib.* 1672. A. fol. 363, 443, it appears, that this cause was set down for hearing on the 15th April; and that on the 9th of May the plaintiff was ordered to make his election to proceed either at common law, or in equity. By *Reg. Lib.* 1673, fol. 199, 333, 578, we learn that a cross bill had been filed, and that both causes were on the 26th January directed to be heard together; and the depositions taken in one to be used in the other: that on the 31st of January the cause came on to be heard, when, it appearing that the question depended chiefly on the articles of agreement, entered into in contemplation of the marriage of the plaintiff with the daughter of the defendant, a case was ordered to be drawn up; on which the Lord Keeper might (if he saw cause) consult some of the judges. On the 27th of June the cause again came on before the Lord Keeper, assisted by Rainsford, J. when the facts proved, substantially, agree with the report; and the court was fully satisfied, and did declare, that if the plaintiff had made his contract and bargain with the defendant for 4000*l.* portion in such manner as that it would have bound the defendant at law, this court would not have hindered the plaintiff from taking the utmost benefit of that contract at law, though his wife had died the next day after the marriage; but since the plaintiff, who began at law on an action of covenant, finds that he cannot succeed at law, this Court sees no reason to mend the plaintiff's bargain in equity; it not being alleged even that the articles were mis-penned, or drawn up contrary to the intention of the parties. And the said articles, by express contract, make the settlement a precedent condition to the payment of the 2500*l.* which cannot be discharged in equity: or if it were lawful in some

cases, and under special circumstances, for a Court of Equity to expound a deed otherwise than the terms seem to import; yet that ought never to be done but where it is to avoid an extremity. The Court further observed, that the articles contained an express covenant, that if the plaintiff had died before the money paid, his wife was to receive the money; but there was no covenant that if the wife died before the settlement was made, the money should be paid to the plaintiff; which showed it was not intended. Wherefore the Court (Rainsford, J. concurring) ordered the bill to stand absolutely dismissed.

## ( C. 368. )

When a condition is *in terrorem* only.

IF a portion be given to a daughter, provided she marry with the consent of A., &c. this is but *in terrorem*, unless it be given over (a), if she do marry without such consent.

(a) *Vid.* 2 Freem. C. 9, p. 10, and references there given in 2d edit.

## [ 303 ]

## ( C. 369. )

Equity of redemption held not to be assets.

MORTGAGOR and mortgagee; the mortgagor died, and the heir of the mortgagor and mortgagee join in a sale of those lands. *Qu.* whether the money that comes to the hands of the heir by this sale shall be assets to charge him in equity? And *per Finch*, Lord Keeper, it shall not, no more than he shall be charged at law after alienation *bond fide* (a).

(a) The reader will recollect, that, this decision was made three years prior to the statute of frauds and perjuries (29 Cha. 2, c. 3). Since the statute there can be no doubt that an equity of redemption is assets in the hands of the heir; and if aliened or re-

leased, fraudulently as against creditors, the Court of Chancery will follow the money. 2 Freem. C. 130, p. 115, and notes, 2d edit. The principal case is, no doubt, the same reported in 3 Keb. 307, under the title of *Freeman v. Taylor*.

## ( C. 370. )

Rule as to assignment of a mortgage and arrears of interest, without the assent of the mortgagor.

*Trin.* 1674.

A. MORTGAGES to B. for security of 500*l.* the interest runs on for seven years unpaid, so that the money due to the mortgagee is then 710*l.*; then the mortgagee, upon receipt of this 710*l.* from J. S. assigns this mortgage to him. Resolved *per Finch*, Lord Keeper, that J. S. shall not reckon interest for 710*l.* from the time of the assignment, but only for the 500*l.* which was the original principal (a); for if that should be allowed, by that means the mortgagee might assign over every six months, and by that device have interest upon interest.

(a) *Vide* 2 Freem. C. 34, p. 30. C. 146, p. 127. C. 290, p. 217, and notes in the 2d edit.

## ( C. 371. )

Jurisdiction in matters of tithes.

A BILL was exhibited for tithes, and the jurisdiction of the Court demurred to; but the demurrer overruled, and the defendant ordered to answer (a). And it was said by *Finch*, Lord Keeper, that the Court of Exchequer did not hold plea by English bill until the statute of 33 H. 8, 39.

(a) *Vide* 2 Freem. C. 29, p. 27, 2d edit.

## CHEEKE v. LORD LISLE.

( C. 372. )

Continued from p. 302.

CHEEKE married the daughter of the Lord Lisle, and upon the marriage it was agreed by articles, that he should have 1500*l.* in hand, and that he should within the space of four years settle 400*l.* *per annum* upon her and her children, more than he had done upon the marriage, and upon such settlement made he should have 2500*l.* more; the marriage took effect, but the lady died within a month after marriage. The question was, whether or no he should have the 2500*l.* for he had four years time to make the settlement, and there was no default in him, but he was prevented by the act of God.

Where a portion is contracted for conditionally, Equity can give no relief if the performance of the condition is prevented by unforeseen accident.

\* It was held by the Lord Keeper and Justice *Rainsford*, [ \* 304 ] that he should not have it.

For first it was agreed he had no remedy at law, the condition not being performed; and so the question was, whether here was any inducement for equity? and it was held that there was not; and so the plaintiff's bill [*was*] dismissed (a).

(a) 2 Freem. C. 38, p. 36. C. 64, p. 58, and notes, 2d edit. The principal case is cited in *Vermuden v. Read*, 1 Vern. 69.

## LADY TYRREL'S CASE.

( C. 373. )

S. C. 2 Eq. Ca. Ab. 155.

THE case was: Sir Toby Tyrrell died, having his daughter's portion, left her by her grandfather, in his hands; his lady had several jewels, some whereof she had before marriage, others were bought by her with her own money, as she pretended, during the coverture; Sir Toby allowing her a yearly sum for her own expenses, out of which she saved money to purchase those jewels. The question was, whether those jewels should be liable to make good the daughter's portion, or whether the lady should have them as paraphernalia? and it was ruled by the Lord Keeper *Finch*, that if there was not sufficient for payment of debts (a), the wife should have no paraphernalia; for it is not fit she should shine in jewels, and the creditors in the mean time to starve; and he said, if the wife should in this case have the jewels, and her daughter want bread, this would be to turn the children's bread into stones (b).

A widow's claim to paraphernalia must yield to the claims of her husband's creditors; though she may have bought the ornaments out of her own pin-money; provided she was living with her husband. A trust may result, where a deed is executed without consideration.

And as to the point of buying them with her own money, March, 44. that should make no difference (c); so long as the husband

(a) *Willson v. Pack*, Prec. in Cha. 297. *Campion v. Cotton*, 17 Ves. 273.

(b) But had the daughter's claim to a provision rested on the will of her father, the widow's title must have been preferred: for, although *bona paraphernalia* are liable to the husband's debts, and may be disposed of by him during his

lifetime; they are not devisable by him. *Tipping v. Tipping*, 1 P. Wms. 729. *Snelson v. Corbet*, 3 Atk. 369; see, also, *Offley v. Offley*, Prec. in Cha. 27. *Northey v. Northey*, 2 Atk. 78. *Graham v. Londonderry*, 3 Atk. 394.

(c) But, see 2 Freem. C. 73, p. 64, and note, 2d edit. also, *Herbert v. Her-*

and wife do cohabit; for if the wife out of her good housewifery do save any thing out of it, this will be the husband's estate, and he shall reap the benefit of his wife's frugality; and he said, the reason of it is, because when the husband agrees to allow his wife a certain sum yearly, the end of this agreement is, that she may be provided with clothes and other necessities, and whatsoever is saved out of this redounds to the husband.

But if there be a separation, and the wife hath a separate maintenance, there whatsoever she saves shall be for her own particular use; and so it was ruled by my Lord Coventry in *Sir Arthur Gorge's* case (*d*); and the reason there is, because, when the wife lives from her husband, she is not capable of contracting debts upon him, &c. (*e*).

And he said he never knew any paraphernalia allowed, but where the party was noble either by birth or marriage (*f*).

[ \* 305 ]  
Post, C. 375.

\* And whereas in this case, the daughter's portion being charged upon the father's land, she, at the request of her father, had released her interest in the land, to the intent that he might be enabled to make a clear settlement thereof upon his son, it was declared by the Lord Keeper, that if this were done by the daughter without any consideration, there would be a resulting trust in the father, whereby he should be chargeable to the daughter for so much money (*g*).

*bert*, Prec. in Cha. 64. *Willson v. Pack*, ubi supra. *Slanning v. Style*, 3 P. Wms. 338. *Walter v. Hodge*, 2 Swanst. 106, by which this part of the Lord Keeper's opinion seems effectually overruled.

(*d*) 1 Cha. Rep. 125. 1 Cha. Ca. 118.

(*e*) To support the generality of this position, it must be assumed that the separate maintenance is sufficient for all necessary purposes; that it is regularly paid; and the tradesmen with whom the wife deals have notice of it. *Holt v. Brien*, 4 Barn. & Ald. 254. *Nurse v. Craig*, 2 New. Rep. 152. *Todd v. Stokes*, 1 Salk. 116. *Hinton v. Hudson*, ante,

p. 248, note (*b*).

(*f*) But see the four first cases cited in note (*b*).

(*g*) It is a leading rule in Courts of Equity, that "he who bargains in matter of advantage with a person placing confidence in him, is bound to show, that a reasonable use has been made of that confidence;" per Lord Eldon, C. in *Gibson v. Jeyes*, 6 Ves. 278; and see *Sculthorp v. Burgess*, 1 Ves. Junr. 92, that where the consideration of a deed is only five shillings, a resulting trust arises for the grantor.

( C, 374. )

HICKSON v. WITHAM.—*Pasch.* 1675.

S. C. 1 Cha. Ca. 248. Rep. temp. Finch, 195. 2 Eq. Ca. Ab. 369.

Where a testator charges lands with payment of debts and legacies, the legacies must be postponed to the debts, if the charge be not sufficient to satisfy both: but, under such

THE case was: a man that had several creditors makes his will, and recites, that for the payment of his legacies and debts he devises such lands to his executors, then he gives 800*l.* to his wife, and 800*l.* to his daughter, &c. and says, "that his will is, that these several sums of money should be paid out of money raised upon the sale of his land;" and the value of the land falling short of the debts and legacies, the question was, whether the debts and legacies should equally be paid, or whether the debts should be first paid (*a*)?

(*a*) The reader will observe, that this question was made eighteen years before the stat. of fraudulent devises; (8 Will.

and Mar., c. 14.) since that act, a doubt could not exist, where the charge is, as in the present case, by will. See



And it was held by Finch, Lord Keeper, that in this case the debts should be first paid; and he took a difference, where lands were conveyed by deed in trust for the payment of debts and legacies, there they should go *pari passu*, and should have proportionable satisfaction, and the debts should have no preference; but where lands were devised to an executor for the payment of debts and legacies, this shall be intended that he shall have them as assets; because the testator shall not be supposed, without express words, to be so unconscionable, as to give his estate in legacies, and leave his debts unpaid. But if he devises lands for the payment of legacies only, this shall not be liable to debts, because it was in the power of the testator to dispose of it under what conditions and to what purposes he pleased (b); and if he would make so unconscionable a will, he said he would not make a better will for him. And he agreed farther, that if so be he had devised that his legacies should be first satisfied, and that then the remainder of the profits should go to the satisfaction of his debts, that then the legatees should be served before the creditors; but the naming of legacies first (as to say legacies and debts) gives no preference: but here his intention being apparently to provide for his debts and legacies, though the legacies are specified, and his desire that they should be satisfied, yet it shall be intended in course of law, and in that way which was most conscionable for the testator.

a provision for payment of debts, Equity makes no distinction between specialty and simple contract debts.

[ \* 306 ]

But here he said, that there being a provision for the payment of his debts, there should be no difference between bonds and debts upon contract (c); but they should be equally satisfied; for, being just debts, there should not be that difference betwixt them upon a nicety of law, that some should have all, and others none.

And it was agreed by them all, that if a man devises lands to his executors for the payment of his debts and legacies generally, that it shall be assets, and debts must have the preference, according to the rules of law.

2 Freem. C. 54, p. 49, 2d edit. C. 136, p. 121, note (4). C. 339, p. 270. It seems also difficult to believe, that it would be practicable, in the present day, to support the distinction here taken by Lord Nottingham, even if the charge were by deed of trust. The lands being once subjected (though not by will) to the payment of debts and legacies; it should seem most accordant to modern principles to presume, that it was the intention these demands should be paid according to their several degrees, and with a due observance of the usual and equitable rules of preference: a different

intention, however distinctly expressed, could hardly avail; the legacies must, *ex vi termini*, be given by will; to this extent, therefore, the testator must have retained a disposing power over the lands, or a charge to arise thereout, which, it is supposed, must bring the case within the purview, and indeed the very words of the second section of the statute cited.

(b) Not so, of course, since the statute of fraudulent devises.

(c) *Kidney v. Coussmaker*, 12 Ves. 154:

*Reg. Lib.* 1674. A. fol. 210, 429, 492. On the 23d of January this cause was set down to be heard; and on the 18th of February a decree was pronounced; but

execution thereof stayed, on the petition of the defendants, who undertook to produce precedents of contrary resolutions. On the 11th of May the cause was again brought on, when the order made on the former hearing was confirmed, whereby the will was established, and the trusts thereof decreed to be performed; and that the monies arising by sale of the lands, and the rents and profits thereof till sold, should be applied in payment of debts in the first place: and after the debts were discharged, in satisfaction of the legacies; but if the estate should not be enough for the full payment of all the debts, they were to be paid in equal proportion, and without distinction.

( C. 375. )

SEAMAN v. WARMAN.—*Mich.* 1675.*S. C.* 3 Keb. 544. *Rep. temp.* Finch, 279. 2 Ch. Ca. 209.

Construction of a limitation, in trust for A. during his natural life, after whose death the trustees were directed to assign over all their right, title and interest to the issue of the said A., and for default of such issue to B.

A LEASE for 100 years was assigned over by Tho. Warman and Julian his sister, to one Penrose and Warman, upon this trust, that they should permit the said Julian to take the profits during her natural life; and after her decease, that then they should upon reasonable request assign over all their right, title, and interest, unto the issue of Julian; and for default of such issue, then that they should upon request assign over all their right, &c. to Tho. Warman, his executors, &c.

Julian dies, leaving issue, the issue dies; Tho. Warman requests the trustees to assign to him, and they refuse.

The question was, whether by this limitation the issue of Julian had the trust of the whole term (as though it had been limited to the heirs of the body of Julian) and then the remainder should be void, or whether the issue in this case should be intended to have the term for life only, and so the remainder would be good?

And it was argued *pro def*, that in this case the remainder was void; because here it is limited that the trustees shall assign over all their right, &c. to the issue; which, being in case of a term for years, shall carry the whole term; and though the limitation over be for default of the issue of Julian, yet that is no more than what is in ordinary conveyances, where the remainder shall never take so long as any issue of the issue be in being.

And it was alleged further, that the word *issue*, in this case, is not so much a word of limitation, as a description of the party who should take the whole term.

[ \* 307 ]

\* But *Finch*, Lord Keeper, seemed strongly to incline to the contrary, and relied much upon *Wild's* case in 6 Rep. which he said was resolved by all the Judges of England; and the reason the Judges went upon in that case, seems to have a great influence upon this; for there they said, because it doth not plainly appear, that the intent of the testator was to create an estate-tail, which must be by putting a construction upon the words contrary to the law (a), therefore they would rather take his intention to be such as stood with the law; and so here it doth not appear, that the testator intended more than an estate for life to the issue: and although the limitation of the trust is, that they should assign all their right, &c. that

(a) *Vid.* 2 Freem. C. 84, p. 75, 2d. edit.

may be very well, for the issue, during his life, has all the right in the term, and what remains is but a contingency. *Ante*, p. 272, note (a).

And he said, that the ancient opinions were, that a term could not be devised for life, with remainders over, as Dy. 74; but the remainder was void; but the Chancery was the occasion that caused the Judges to alter their resolutions; for at that time the Chancery used to make the devisee for life put in security (b), that the remainder-man should have it after his decease; and thereupon the Judges, to prevent Chancery suits, held such a devise to be good, as appears by *Fulwood's*, *Manning's*, and *Lampett's* cases, in Coke's Rep. (c).

But then there was a farther contrivance to devise a long term to a man and the heirs of his body in tail, with remainders over, and these remainders were always held to be naught; and that the first devisee had the whole term in him, to enjoy or to dispose of (d); and, if he died without any disposal, it should not go to the issue, but to his executor: and the reason why the Judges would not permit a remainder of a term after such a limitation, was, because if this had been tolerated, by this means a perpetuity would have been created of a term, which the law will not allow in case of an inheritance; and there would be no means to bar such a remainder, were it good, because the termor could not be a tenant to a *præcipe* to suffer any recovery. And as the Judges condemned such remainders limited out of a term, though it were by a devise; so the Chancery hath always refused to allow of such a limitation of a trust of a term (e); for although a term may be conveyed in trust for several persons successively (f) for their lives, as was held in one *Opey's* case, yet if it be once limited in trust in tail, all remainders over are void; and the trustees are bound, upon request, \* to convey over all to the *cestuy que trust* in tail; and if he dies, the trust shall not be for the issue in tail, but for his executors (g), *come semble*.

[ \* 308 ]

And so he said here, since the words will bear a construction, whereby the remainder may stand, as well as such a one as destroys it, why should we not rather put such a construction upon them as preserves the remainder, than such a one as destroys it?

But the case was not determined: but Mr. Justice *Rainsford*, who then sat with the Lord Keeper, and the Master of the Rolls, were to be attended with the declaration of the trust, and to consider of the case (h).

(b) *Price v. Jones*, Toth. 122.

(c) 4 Rep. 64. 8 Rep. 94. 10 Rep. 46; see next case.

(d) *Lyon v. Mitchell*, 1 Mad. 475. 2 Freem. C. 283, p. 210, 2d edit. C. 357 b, p. 287.

(e) 2 Freem. C. 108, p. 98, and references, 2d edit.

(f) *Thelluson v. Woodford*, 1 New Rep. 385.

(g) *Williams v. Jekyll*, 2 Ves. Senr. 685.

(h) See the extract from the Register's Book. Six years subsequently, in the *Duke of Norfolk's* case, (the leading case on the doctrine of perpetuities, re-

Trust resulting.  
Ante, C. 373.

And it was held, that if a lease for years be made without any consideration, there will be a resulting trust to the lessor; but if there be any consideration, there can be no resulting trust.

ported 3 Ch. Ca. 14, *et seq.*) Lord Nottingham exhausted the subject; and modified the rule to which he here acceded, by establishing, upon foundations which have never since been shaken, that by way of executory devise or

springing trust, a trust of a term may be limited in tail, with remainder over, provided such remainder must necessarily take effect, if at all, during a life or lives in being at the creation of the trust. See, 2 Freem. c. 212, p. 166, 2d edit.

*Reg. Lib.* 1674. B. fol. 239, 650, 665. On the 23d of June it was ordered that the plaintiff should be at liberty to use depositions taken in a former cause touching the matters and lands in question: and also to produce witnesses at the hearing, to prove deeds and copies of records, leaving the other side to their just exceptions. On the 6th, 8th and 13th of July the cause was heard before Lord Keeper Finch: and on the 19th of July set down for a rehearing. By *Reg. Lib.* 1675. B. fol. 41. 53, 223, we learn, that on the 6th of November the cause was brought on before the Lord Keeper, the Master of the Rolls, and Rainsford, J., when the two latter judges were desired by the Lord Keeper to consider the cause and furnish him with their opinions; but the Master of the Rolls falling sick, Rainsford, J. alone was to give his opinion. On the 1st of February following the cause was again brought on. At the first hearing Finch, then C. S. now Lord Chancellor, declared an opinion that the last remainder of the trust of the term under which the plaintiff claimed was good: for that, to make an entail by construction, in order to destroy a remainder, would be hard. Wherefore his Lordship did decree the defendant to assign the premises, and account for the profits thereof, received by him, to the plaintiff. But, now, Rainsford, J. having advised with others of the judges, delivered his opinion, in writing, as follows:—"I am of opinion, 1st, that, by the declaration of trust, the benefit of the whole term, unexpired at Julian's death, did attach and vest in Eleanor as her issue, and not only an estate for life; and that upon the death of Eleanor the whole remainder of the term ought to go to her administrator. My reason is, because, by the express declaration of trust, it is directed that the trustees shall assign all their right and title in the lands in question to the issue of Julian; and if the trust had been executed to Eleanor in her lifetime, according to the declaration of trust, the whole residue of the term would have been assigned to her; and therefore, being vested in her, ought to go to her administrator. 2dly, I am of opinion, that the limitation of the trust over to Robert and George Warman is void in law; in regard it is not to take effect but for want of issue of Julian; and this, in supposition of law, is a perpetual limitation. And I think *Wild's* case makes not against me; there, the word *children* was taken to be a word of purchase; but had the word been *issue*, as in our case, I think it would have been construed to be a word of limitation, and not a word of purchase: it being very lately so resolved, in the Exchequer Chamber; and a judgment reversed given to the contrary in B. R. upon the authority of *Wild's* case. And, in our case, to make good the limitation to the Warmans, there must be a strained construction in these two particulars, first, of the estate to the issue of Julian, viz. that it should be only for life; which is contrary to the trust declared; secondly, of the limitation over to the Warmans, viz. that it should take effect, not, as the trust directs, for want of issue of Julian in general, (according to the extensiveness of the word issue in the construction of law,) but only after Eleanor's death. In the last place, if the limitations to the issue of Julian had been, in express words, for life of the issue; yet the limitations over to the Warmans would be void notwithstanding; being, by the trust, to take effect for want of issue of Julian in general: for I find, in a case in this Court, between *Pearce* and *Reeve*, 22d Feb. 13 Car. 2, the very point to be so determined, by the opinion of three learned judges." The Lord Chancellor declared he had considered the above opinion, and the reasons on which it was founded, and, upon the whole matter, was fully satisfied, that the limitation in trust to the plaintiff's father is void: and that the residue of the whole term, unexpired at Julian's death, did attach and vest in Eleanor, and upon Eleanor's death intestate ought to go to her administrator: for his Lordship said, he perceived by the certificate of Rainsford, J. that the resolution in *Wild's* case (on which his Lordship wholly grounded his former opinion,) would not hold, if the words there had been *issue* instead of *children*; therefore, his Lordship laid aside his former opinion delivered in this

cause; and did discharge the decree thereupon pronounced, and did order the plaintiff's bill to be dismissed.

SMITH v. ASHTON.—*Mich.* 1675.

(C. 377.)

*S. C. Rep. temp. Finch*, 273. 1 *Cha. Ca.* 263. 3 *Keb.* 551. 3 *Salk.* 277. 1 *Eq. Ca. Ab.* 345.

A. MAKES a voluntary conveyance to the use of himself for life, &c. reserving a power to make a disposal of any part of it by writing under his hand and seal; and then he makes a disposal by will without putting to his seal.

How far a Court of Equity may dispense with immaterial circumstances, in the execution of a power.

The question was, whether this were a good execution of his power? And *Finch*, Lord Keeper, gave his opinion, solemnly, that it was (a). And he cited a (1) case in Lord Elsmere's time, where a man had a feoffment to the use of himself for life, with a power to make leases, &c. And in the deed there was a covenant, that if livery were not made, he would stand seised to the uses aforesaid; afterwards he makes leases, and dies without making any livery; and the question was, whether or no these leases should stand good or not? And it was held that they should stand good (b) by virtue of the power; for although the power could not be executed and stand good out of those uses raised by virtue of the covenant to stand seised, according to *Mildmay's* case; neither could they be executed by the feoffment, no livery being made; yet, because it was clear that such a power was intended to the party, though there were a defect in the execution of the estate, this shall not invalidate the estates raised out of the power; and so he said another case had been ruled since that, between *The Countess of Oxford* (c) and *The Lady Bruce*, where the jointure of the Coun\*tesse of Oxford was governed by a power which was raised out of an estate that was not well executed; and yet ruled to be good enough: and he said, there was no reason that there should be so strict a construction of powers where the owner of the land (d) creates to himself a particular estate, with a power under certain circumstances; for the design of those circumstances (as writing under hand and seal, and with two witnesses (e), &c.) is but to prevent the counterfeiting of the executing or revoking of the power; but where it doth appear, that it was intended the person should have such a power, and that estates are made by him in pursuance of that power, the Court of Chancery will not be strict in all the circumstances of executing of it (f); and he said, the resolution in *Whitlock's* case, 8 Co. (where an estate is made for ninety-nine years, if three lives lived so

(1) Note, That at this time *Mildmay's* case, 1 Co. was not resolved.

[ \* 309 ]

(a) *Bath and Montague's* case, 3 Ch. Ca. 106.

(b) *Burgh v. Burgh*, Rep. temp. Finch, 29.

(c) Tot. 132.

(d) But this distinction between powers given to a stranger having a particular estate, and those reserved by the

owner of the fee, having so direct a tendency to introduce different decisions upon the same words, is said to be completely exploded at the present day. See Sugd. on Pow. 564, 2d edit.

(e) *Sergison v. Sealy*, 2 Atk. 415.

(f) *Holmes v. Coghill*, 12 Vca. 216.



long, in pursuance of a power to make leases for three lives) may be laughed at; and therefore although *æquitas sequitur legem* generally, yet sometimes *lex sequitur æquitatem*; and the Judges of late have made larger constructions of power as appears in *Cumberford's* case, 2 Rol. 262; and *Wakeman* and *Waker's* case he cited as resolved; but *note*, that it was then depending. *Vide, post*, Case 546.

*Note*; That if an estate for life had been limited to a stranger with such a power, this disposal by will without seal would have been no good execution in Equity, *come fuit tenus per Lord Keeper, come Bellwood dit a moy*.

*Reg. Lib.* 1675. B. fol. 169. The cause was first heard on the 7th of July; when it appeared that Ralph Ashton, deceased, did in 1665 prepare notes in writing by him signed, which he declared should be the effect of his last will; and which he further declared were instructions for counsel to draw his last will by, in form and method; which said writing was drawn and engrossed by the directions of the said Ralph Ashton, though he died before it was methodically drawn into a will, or before he sealed such will; so that it had not the formality of a legal charge or settlement, and his power was not exactly and literally pursued, which by his sudden death was prevented. The Court ordered the plaintiff to proceed to a trial at law, upon an issue, in order to have the opinion of a jury whether the said notes and instructions were to be taken as part of the will of the said Ralph Ashton; and such trial having been duly had, against which no exceptions were taken by either side, and the jury having found that the said notes and instructions were part of the last will and testament of the said Ralph Ashton; the cause was, on the 13th of November, again brought on, upon the equity reserved; and on the 15th of November the Lord Keeper declared, that, the verdict having found as aforesaid, he conceived that there was a good execution of the power in equity; notwithstanding the circumstance of a seal being put thereto was wanting; and that the said notes and instructions were a clear indication of the intent to execute. And his Lordship decreed accordingly; but without giving costs on either side.

( C. 378. )

MRS. BRISCO v. THE LADY BANBURY.

S. C. 1 Cha. Ca. 287, and 2 Freem. C. 8, p. 8, both reports embracing other points.

Construction of a marriage settlement, to the use of the settlor for life, then to his wife for life, then to the settlor's issue male; and for default of such issue, to trustees for a term, in order to raise portions for daughters by sale, demise, or perception of profits.

[ \* 310 ]

THE Lord Banbury makes a settlement upon the marriage of his first wife, to the use of himself for life, then to his wife for life, then to his issue male; and for default of such issue, to trustees for 99 years, for the raising of portions for daughters by sale, demise, or perception of the profits, &c.

*1st Quest.* Whether the trustees, after the death of the Lady Banbury without issue male, living the lord, might sell this term for raising the portions? And *Finch*, Chancellor, held, that they could not; and so he said it had been resolved in the Lord *Bridgeman's* time, in one *Samuel Codrington's* case, because the sale of a reversion would be at so small a rate, that the heir by this means would be prejudiced much in his inheritance (a).

\* *2d Quest.* Whether, after the death of the lord and lady without issue [male], the daughters should have interest for their portions from the time of their death, if the portions were not presently raised?

(a) See 2 Freem. C. 332, p. 263, note (5); and C. 340, p. 271, 2d edit.



And he held they should (b); and though the trustees should be allowed convenient time for the raising the money, yet when it was raised, the daughters should have interest from the time of the death of the survivor, without issue male.

3. It was held in this case, that, if the revenue of the land were so small that this portion would be long a raising by the rents and profits of it, the daughters might exhibit their bill in this court, and compel the trustees to a sale, but then the heir in remainder must be made a party; because, if he will pay the money, this Court will not decree a sale to the prejudice of his inheritance, without his default (c).

4. Sir *William Jones* held, that if in this case the trustees, before the birth of any daughter, did join with the Lord Banbury in mortgaging part of the lands so settled for raising of portions, this was no breach of trust before the birth of any daughter.

But in that point his Lordship delivered no opinion (d).

(b) 2 Freem. C. 361, p. 292, note 2, 2d edit.

(c) Wherever the interests of an heir at law are implicated; the Court is unwilling to take any step in a cause in his absence. *Anon.* 1 Ves. Junr. 29. *Graham v. Graham*, *ibid.* 276.

(d) "It is one thing to say, the trustee would have been well warranted in not acceding to the act; and another, that he did wrong by acceding;" *per* Lord Eldon, C. in *Parkes v. White*, 11 Ves. 223, and in *Moody v. Warlters*, 16 Ves. 308.

*Reg. Lib.* 1675. A. fol. 202, 795. *R. L.* 1676. A. fol. 45, for extracts from which, see 2 Freem. C. 8, p. 8, 2d edit. where another hearing of this cause is reported.

( C. 379. )

FATHER tenant for life, remainder to the son in tail, remainder to the right heirs of the son; the son, in the lifetime of the father, makes a lease for years, and then suffers a common recovery, and then dies without issue: in this case these points were held clearly,

1. That when the son makes a lease for years, this operates as well out of his remainder in fee, as out of his estate-tail; so that when he dies without issue, this is a good lease against the heir in fee; unless the issue of tenant in tail had entered and avoided it (a).

2. When tenant in tail makes a lease for years, and then suffers a recovery, this works by way of corroboration upon the lease, and makes that good (b).

It was held in the same case, that if a man, who hath an incumbrance upon an estate, encourages a purchaser, and conceals his incumbrance, that it shall be set aside as fraudulent (c).

(a) *Symonds v. Cudmore*, 4 Mod. 5. 1 Salk. 338. Carth. 248.

(b) *Benson v. Hudson*, *post*, p. 362.

2 Freem. C. 84, p. 77, note 12, 2d edit.

(c) *Evans v. Bicknell*, 6 Ves. 182. *Ex parte Kerr*, 3 Ves. & Bea. 111.

Effect of a reversionary lease, granted by a tenant in tail in remainder, with further remainder to his own right heirs, when he afterwards suffers a recovery, and dies without issue.

## ( C. 380. )

Plea of the  
Statute of Limi-  
tations.

STATUTE of limitations being pleaded to be made 24 Jac. was held to be naught; but in another case, it being pleaded to be made in the one and twentieth year of the reign of King James over England, Scotland, &c., was held good enough; they would not take notice what year of his reign over Scotland it was, it being right for England. But it was agreed, that though this is an act that the Judges shall take notice of (a), being general, yet if the party takes upon him to plead it specially, and mistakes, it is fatal to him.

(a) Though the statute itself is usually set forth in the plea; yet that, perhaps, is unnecessary: the substance of the plea consists in the averment of matter necessary to bring the case within the statute. Mitf. 210.

## ( C. 381. )

A purchaser without notice of a decree, which has not been executed, may plead a fine and non-claim in bar of their tardily asserted rights under such decree.

Cro. Car. 110.

## GIFFARD'S CASE.

UPON a demurrer to a *sci' fa'* bill to have execution of a decree, the defendant pleaded, that he was a purchaser without any notice of the decree; and that a fine with proclamations was levied, and five years passed without claim (a).

The question was, whether a fine with proclamations, and non-claim for five years, should bar this decree?

And *Finch*, Lord Keeper, seemed to incline that it should, and cited a case adjudged by the Lord Chief Baron *Hale*, between Mr. *Anslow* and Sir Nicholas *Storton*, that a trust should be barred by fine and five years non-claim; and that the entry of the *costui que trust* in the five years would not hinder, but he must bring his *subpcena* (b); and he cited a judgment in the Common Pleas, where a fine executory was levied, and afterwards another fine with proclamations was levied of the same lands, and five years passed; and then a *Sci' fa'* being brought to have execution of the first fine, it was held that this *Sci' fa'* was barred.

And they all seemed to hold, that any judgment for the land would be barred by a fine and non-claim.

But a judgment in debt is not barred by a fine, but that the party may have execution when he pleaseth (c); but the reason of that is, because that is merely collateral to the land; and if the party releaseth all his right to the land, yet he may sue forth execution, but if he releaseth all demands, he cannot, for the execution is a kind of demand.

[ \* 812 ] The *Attorney-General* alleged, that a use at common law would not be barred by a fine of the land. But the \* Lord Keeper held, though the old opinions were so, yet the latter opinions were contrary (d).

(a) Plea of conveyance, fine, and non-claim, is not open to the charge of multifariousness, as amounting only to the single point of a plea of title. *Doble v. Cridland*, 2 Br. 275. See, however, the reasons which render it imprudent to plead all these several matters, where one of them would be a bar; Mitf. 238; see,

also, 2 Freem. C. 237, p. 177, note 4, 2d edit.

(b) *Bovey v. Smith*, 2 Cha. Ca. 126. 2 Freem. C. 18, p. 21. C. 80, p. 69.

(c) See *Clifford v. Ashley*, 1 Cha. Ca. 268.

(d) *Bellew*, c. 146, p. 33. March's N. C. p. 140.

They all held, that a fine of the land doth not bar a rent (e) issuing out of the land, but wherever the land goeth, it goeth clothed with the charge of the rent; and that no way disturbs the possession of the land, and so is consistent with the fine.

In the principal case he seemed to hold, that a decree for the land was barred (f); but he said, he would consult with the Judges, and hear the case argued.

(e) *Saffyn v. Adams*, Cro. Jac. 60.

(f) See the case of *Salisbury v. Bagot*, as given from Lord Nottingham's MSS. in Appendix to 2 Swanst. 610, that "a fine doth bar a trust, or any other right in equity;" and, still more expressly in point, *Worsley v. Earl of Scarborough*, 3 Atk. 392, that "there is no such doctrine in the Court of Chancery, that a decree made there shall be an implied notice to a purchaser, after the cause is ended; but it is the pendency of the suit that creates the notice: where it is only a decree to account, and not such a one as puts a conclusion to the matters in question,

"that is still such a suit as does affect people with notice of what is doing." The case of *Self v. Madox*, 1 Vern. 459, which, at first sight, seems contrary, may be distinguished: there, though a decree was made not merely for an account, but ascertaining the right of the plaintiff, still an option was left to the defendant, as to which of two very distinct modes of satisfaction should be pursued: a further application to the Court must therefore have been contemplated as probable, at least; and it may, fairly, be considered as a case of *lis pendens*; not as a cause ended.

*Reg. Lib.* 1675. A. fol. 50, 95, 328, 566, there were several defendants, who put in several pleas and demurrers: on the 17th of February a case was ordered to be stated, upon the bill and the several defences; but the parties could not agree as to the framing the case, and the cause was set down for judgment, without any case being drawn up; on the 25th of February the several pleas were allowed; but the plaintiffs to be at liberty to reply; and the defendants were to let the plaintiffs have copies of the fines pleaded by the several defendants.

FINCH seemed to hold, that an appeal would lie from the Lord Mayor's Court into Chancery, as it doth from the Grand Sessions in Wales (a); but it will not out of the Exchequer (b), because the plaintiff there comes by privilege, as the debtor to the King; and all the Courts in Westminster Hall are upon a level, and of equal antiquity.

( C. 382. )

From what courts an appeal to Chancery lies.

(a) *Addison v. Hindmarsh*, 1 Vern. 442. *Portington v. Tarbock*, *ibid.*, 177. 2 Freem. C. 217, p. 169; but see Mitf. 123, and *Galbraith v. Neville*, in note

to 1 Dougl. 6.

(b) *Gage v. Bulkeley*, Ridgway's Ca. temp. Hardw. 264.

### CORDEROY'S CASE.—*Mich.* 1675.

( C. 383. )

S. C. Rep. temp. Finch, 235.

CORDEROY was indebted to Spellman, and gave him a note for it under his hand to pay it to him or his assigns; Spellman was indebted to Hynde and Carpenter, Spellman assigns this note to Hynde, and Hynde shews Corderoy the note, and he accepts it, and promises payment of it; afterwards Carpenter comes and asks him whether he owes Spellman so much money; he confesses it, and by his consent, Carpenter, by a foreign attachment, attaches the money in his hand: and Corderoy exhibiting his bill here, that he might not pay the

To what extent the Court of Chancery will support the practice of foreign attachment. Promissory notes assignable for consideration.

money twice, and bringing the money into Court, the question was, who should be preferred, because he had promised Hynde the payment of the money before it was attached in his hands?

And by *Finch*, L. K. Hynde shall have the money; because although such a note is not assignable in law, yet it is in equity, when there is a valuable consideration (*a*); and Corderoy by his promise became debtor in Equity to Hynde; and then although the foreign attachment after lays hold of it in his hands, yet this shall not defeat Hynde; for the custom of foreign attachments shall receive no countenance in this Court any farther than the custom carries them; for it is a custom that would be void (*b*) if it were not confirmed by act of parliament.

[ \*313 ] \* But because Corderoy had suffered this foreign attachment to proceed against him, without seeking relief upon his engagement to pay the money to Hynde, the Court left Carpenter at liberty to proceed against Corderoy upon the foreign attachment, so that by his own contrivance he was doubly charged.

*Ants*, p. 14, C. 13. *Style*, 370.

And it was said by *King*, that this promising payment upon a note of the debtor's assigned over, is not like accepting a bill of exchange; for though no action of debt, or *indebitatus assumpsit*, will lie upon a bill of exchange accepted, yet an action upon the case declaring *per consuetudinem mercatorum per quam onerabilis existit*, lies well enough; and so it was said by *Twisden* in B. R. *Mich. Term.* 1676.

(*a*) *Jones v. Roe*, 3 T. R. 94.

local usages are to be supported. *Knight*

(*b*) See, as to the principle upon which *v. Halsey*, 2 Bos. & Pull. 191.

*Reg. Lib.* 1675. A. fol. 154. The decree, made 27th of November, was that the money should be paid out of Court to the defendant Hynde; and that, as against him, the bill be dismissed with costs. The defendant, Carpenter, to take his remedy against Corderoy for the sum recovered in the Sheriff's-court: but the said Carpenter was to assign the benefit of a judgment he had obtained as against Spellman, to a clerk in Court, in trust for Corderoy, so far as to reimburse him what he should pay under the foreign attachment; and upon Carpenter's making such assignment, the bill as against him to be dismissed, and Carpenter's costs of that suit wherein Corderoy is plaintiff to be paid him by Corderoy.

( C. 384. )

Occupancy without equitable title not aided.

A MAN, that had gotten into an estate as occupant, sued for the conveyances that did belong to the estate. But by *Finch*, he shall have no aid of this Court to confirm his title; and although it be a title in law, yet it is intended to be remedied by parliament (*a*).

(*a*) See, stat. 29 Cha. 2, c. 3, s. 12. 14 Geo. 2, c. 20, s. 9.

( C. 385. )

Rules as to probate of wills.

B. is made executor for ten years, and afterward C. is to be executor; B. proves the will, and then the ten years expire; the question was, whether C. ought to prove the will again, or whether he might administer without any probate? And it

was held by *Finch*, that the probate of the will by B. should not determine the election of C.; but that he might be at liberty to take the executorship upon him, or refuse it; but, if he pleased, he might administer without any farther probate (a).

(a) Wentw. Off. of Ex. 13. 3 Bac. Ab. 30.

( C. 386. )

It was said by *Finch*, that though an executor of an executor should not be charged at law (a) for a *devastavit* by the first executor, yet in equity here he should be charged.

What parties answerable for a *devastavit*.

(a) But the law has been altered in this respect by stat. 4 & 5 W. & M. c. 24, s. 12. *Post*, p. 392, C. 506.

## REG' DE INFER' JURISDICT.

[ 314 ]

( C. 387. )

THE matter alleged for damage ought to be within the jurisdiction. Cro. Car. 570 (a).

Nothing shall be intended out of the jurisdiction of a superior Court but that which doth specially appear.

And nothing shall be intended in the jurisdiction of an inferior Court but what is specially alleged.

Nothing shall be intended out of the jurisdiction of a superior court, or within that of an inferior court, unless it specially appear. *Ante*, p. 104. 2 Ld. Ray. 1310-1.

(a) i. e. if the special damage be essential to the cause of action. *Stannian v. Davis*, 1 Salk. 404. 2 Ld. Ray. 795. 1 Saund. 74, note (1) by Serjeant Willma.

## JUDGMENTS REVERSED, AND JUSTIFICATION BY PROCESS IN INFERIOR COURTS.

*Vide Erroneous Entries*, p. 281.

BENNET v. EVANS.—*Trin.* 1673. B. R.

( C. 388. )  
1 Rol. 800, 801.

ERROR upon a judgment in the Court of Dorchester, these things were alleged,

1. It was alleged, that the first process was a *Capias*, whereas it ought to have been a summons. But *Hale*, C. J. said, rely not upon that, if it be alleged to be *secundum consuetudinem*.

A *capias* may issue out of an inferior court before a summons by custom. *Cont.* 1 Rol. Ab. 563. *Acc. post*, p. 316, 320. *Lutw.* 1565.

2. At the *venire fa'* the record was *præceptum fuit*; which the Court said was bad (a).

3. It was *præceptum fuit* to the officer *viva voce*, who returned the panel annexed to the precept; whereas that was impossible, (*per Hale*), unless he sew it to his lips.

Entry of a return to a *viva voce* precept. *Ante*, p. 19, C. 21. 1 Wils. 17-8.

4. It was *per quos veritas melius scire poterit*, whereas it should be *sciri* (b); and though there be no such Latin word, yet it is \* so in the register, and in the statute of 27 Eliz. 6. which raises the estates of jurymen from 40s. to 4*l.* 1 Rolle, 803; and so it was held to be error. *Mich.* 1676. B. R.

[ \* 315 ]

(a) *Vid. ante*, C. 323.

(b) *Ante*, p. 104.

*Semb.* a special custom must be stated with particularity (c).

5. *Per Twisden*:—Although he doth allege, that a *Capias* was sued out *secundum consuetudinem Curiae*, yet being he hath not said *a tempore in ejus contrarium hominis memoria, &c.* it is bad.

(c) *Vid. post*, C. 393. 2 Lutw. 1188-9. 1 Salk. 365. *Post*, p. 459.

( C. 389. )

DELBRIDGE *v.* PENTYER.

*Semb.* the style of an inferior court must shew its authority.

It is said in the record, “ at the Court of the King,” held, &c. and doth not say “ by letters patent,” nor “ by prescription” (a).

(a) *Tomkins's case*, *post*, p. 322. Cro. Dig. Courts. P. 6. If the authority be by letters patent, no *profert* is necessary. *Titley v. Foxall*, Willes, 688. *Moravia v. Sloper*, Willes, 37. Com. *Vide* 1 Sid. 311.

( C. 390. )

CLEMING *v.* FUDGE.

*S. C. post*, p. 318.

*Ante*, C. 322 b. 1 Lill. Ab. 721. IN the *venire fa'* it was *præceptum est*, &c. and doth not say *per Curiam*. *Vide post*, Case 395.

( C. 391. )

HARLAND *v.* COCKE.—C. B.

On the form of pleading a justification by process out of the county court of Lancaster.

ASSAULT and battery. The defendant justified, by reason of a process issued out of a Court in Lancaster, called the county court, &c.

Exceptions taken to the defendant's plea by Serjeant *Jones*.

1. It is alleged, that the Court was held *coram vice comite*, and a County Court ought to be held *coram sectatoribus*, for they are judges; and so it is as it were *coram non judice*. 2 Cro. 582. 6 Co. 11.

2 Inst. 70.

2. It is alleged, that the prescription is to hold it *de 15 diebus in 15 dies*, and the statute of 2 Ed. 6, 25, is, that it shall be holden *de mense in mensem*.

Exception to the custom.

2 Rol. 795.

3. As it is alleged, it is unreasonable; for it is said, that it is used upon a *questus est nobis* that the party should levy *quandam querelam*; which may perhaps be debt, and the *questus est nobis* is only for actions on the case.

4. It is not laid, that the plaintiff *must* be of matter within the jurisdiction of the Court.

5. It is alleged, that upon a plaintiff entered they used to take out a *Capias*; which is contrary to law, for in all cases there ought first to be a summons. 1 Rol. 563. 2 Rol. 277. But in London they may, because it is confirmed by act of parliament. 9 Co. 68. Cro. Car. 167.

[ \*316 ]

\*6. It is said in *Curia Cancellarie Dunelensi*, which may be the Court of the City.

7. It doth not appear, that the cause of action doth arise within the jurisdiction of the Court; for it is for a horse sold, and doth not say, sold within the jurisdiction of the Court.

*Ante*, Case 122, p. 104.



8. It is said, that the custom is to hold the Court *de 15 diebus in 15 dies*, and it is alleged, that the process was taken out the 12th of August, and returnable the 26th, which will not make 15 days, unless the 12th and 15th are taken inclusively.

And if a Court, being to be held at a certain day, be held at any other, it is void, and *coram non iudice*.

Answers *al object'* :

*Ad primam* : It is a county palatine, and the Court hath always been held before the sheriff, and so that is well enough by custom: and *Vaughan* said, that to hold a Court Baron *coram seneschallo* is good enough, if it be alleged by way of custom.

Court Baron may be held *coram seneschallo* by custom. *Per Vaughan. Ante, p. 19, note (a). Post, C. 397.*

*Ad secundam* : A custom to hold it every fifteen days is well enough by custom.

*Ad tertiam* : *Quandam querelam* shall be intended a plaint, pursuant to the *questus est nobis*, and this being in bar shall be good to a common intent.

*Ad quartam* : It is alleged, that the matter must be within the jurisdiction; for it is said, that within the county, &c. there is such a custom, which shall be good by common intendment, and shall relate to things only in that place.

*Ad quintam* : To take out a *Capias* before a summons by custom may be good. *Per Vaughan, &c. (1).*

(1) *Ante, C. 388.*

*Ad sextam* : It shall be intended the County Court, (and not the city), that being spoken of wholly before.

*Ad septimam* : Though it is not alleged, that the horse was sold *infra jurisdictionem Cur'* (2), yet it is alleged that that promise was made *infra jurisdictionem*, which is well enough.

(2) *Ante, p. 104. Post, C. 392. C. 400 b.*

*Ad octavam* : It being 15 days inclusively is well enough.

And it was said farther, that this being a county palatine, the Court is not like other inferior Courts, but within the county hath a general jurisdiction, like the Courts at Westminster. 1 Rol. 801.

1 Saund. 73-4.

And it is only by custom, that *Latitats* issue out of the King's Bench without summons. An action upon a *concessit solvere* in Bristow good by custom. Godb. 49.

And it appears, that *Capias's* have issued without summons. Old Entries 141. Rast. 341.

\* A custom may be alleged in a county that cannot in an inferior court, as a county may prescribe in *non decimando*. Doct. et Stud. 147. And *Vaughan* said, so might a parish or town, though a particular person cannot. 1 Rol. 653. *cont'*. *Mes semble per 2 Inst. 645. q' un towne ne poet.* Parson's Law, 252 (a).

[ \* 317 ]  
A county, parish, or town may prescribe in *non decimando*, but not a particular person. *Per Vaughan.*

(a) That a parish is not capable of such a discharge, see March, 25. Bunbury, 61. Nor a liberty, however extensive. *Johnson v. Bais*, Gwill. 373. That a custom *de non decimando* is only admissible in a whole county or hundred, or other district of considerable extent and ascer-

tained limits, as the *Weald* of Kent or of Sussex, see 1 Rol. Ab. 653-4. *Nagle v. Edwards*, 3 Anstruth. 702. 9 Viner, 24, and the arguments of counsel in 4 Mod. 342. Harg. Co. Lit. 110 b. note (2). And according to the decision in *Hicks v. Woodson*, 1 Ld. Ray. 137. 2 Salk. 655.

A hundred may prescribe in *non decimando*. Parson's Law, 252. 1 Rol. 653.

No action lies against officers of an inferior court for executing process, which issued irregularly; if the Court can make out such process, and have jurisdiction of the cause.

And it was said, and agreed *per Curiam*, that no action lies against the defendants, who were but servants to execute the process, although it issued out irregularly, if the Court can make out such a process, and have jurisdiction of the cause (b). 6 Co. 54. 10 Co. 86. *Per Vaughan*:—That which is good by act of parliament is good by custom, for it supposes an act of parliament (c). *Jud' pro def' nisi, &c.* [Continued, post, p. 319.]

4 Mod. 324, 336, a custom *de non decimando*, cannot exist even in a county or hundred except of things titheable by custom only and not *de jure*; and upon this ground the exemption was held good in respect of the tithe of wood. See *Thompson v. Holt*, Gwill. 672. *Croucher v. Collins*, 1 Saund. 142, note (2). But the authority of this case is impaired by later decisions which hold wood to be titheable *de jure*. *Jordan v. Colley*, Bunb. 61. *Bouton v. Hursler*, 1 Barnardist. 71. 3 Burn's Ecc. Law, 478-9, &c. Nor is such a local discharge admissible, unless an adequate maintenance be left for the parson; Doct. & Stud. Dial. 2, ch. 55, p. 287, 16th edit. And the sufficiency of the maintenance must be shewn to be co-extensive with the district, for which the exemption is claimed. *Smith v. Johnson*, Gwill. 606. Nor can a county, &c.

claim to be wholly discharged of all tithes without a payment of something in lieu by way of composition, see Gibson's Codex, tit. 30, ch. 5, in the notes to stat. 2 Ed. 6, ch. 13. [The authority of Bishop Gibson appears to be not inconsiderable even in questions of common law, and the merit of his great work on ecclesiastical law has been frequently recognized. See *Pocock v. Bishop of Lincoln*, 3 Brod. & Bing. 36. Bishop Nicholson's Eng. Hist. Library, p. 158, ed. 1714. 1 Black. Com. 392, n. (1).]

(b) See *Browne v. Hartshorne*, ante, p. 19. *Squib v. Holt*, ante, p. 193. *Weld v. Wiggett*, post, p. 320. *Higginson v. Martin*, p. 322. *Webb v. Batchelor*, p. 396, 407. *Philips v. Biron*, 1 Stra. 509. C. T. Hardw. 71.

(c) See post, p. 320.

( C. 392. )

BAKER v. HOLMAN.—*Mich.* 1673. C. B.

False judgment in the county court.

FALSE judgment in the County Court.

Exceptions were taken by *Nudigate* to the record,

1. The *venire fa'* was to summon six persons to try the cause, whereas all trials ought to be by twelve.

2. It is to summon six men *de comitat' prædict'*, but no *Vicineto*.

3. It is to summon six good and lawful men, but he doth not say suitors nor freeholders; and they ought to be freeholders.

*Ans.* It is said, that a *Venire prout* was awarded *secundum consuetudinem*.

(1) Post, Case 393, 401.

But some of the Serjeants said, a custom to try a cause by six had been adjudged void (1).

4th exception was, the plaintiff in the inferior court complains, that Baker, such a day and place, being indebted to him *infra jur'*, &c. for money lent, did *die et loco prædicto* assume to pay, and doth not say, that the money was lent *infra jurisdictionem Curiae*.

In *indebitatus assumpsit* for money lent, both the lending

*Per Vaughan*:—If he had declared upon the promise in law, that did arise upon the lending of the money, he ought to allege, that the money was lent *infra jur'*, &c. but if mo-

ney be lent out of the jurisdiction, and express promise within to pay it, the Court may hold plea of this promise. *Sed alii aliter senserunt*, because he cannot plead *non assumpsit infra jurisdictionem*. *Sed quære rationem*. *Vide ante*, Case 122.

and promise must be laid within the jurisdiction (a).

(a) *Ante*, p. 104, and note (a), *ib.* p. 214. Gllb. C. P. 189. 2 Wils. 16. *Post*, C. 400 b.

ROGERSON v. JACOB.

S. C. 3 Keb. 251.

[ 318 ]  
( C. 393. )

It was said in this case by *Hale*, C. J. that a custom to try by six, being generally alleged, is bad, as to say, *secundum consuetudinem*, &c. but if it be particularly alleged, it is good; as to say, that within, &c. there hath been a custom time out of mind, &c. 1 Rol. 564 (a).

A custom to try by six jurors is good, if specially alleged. *Ante*, C. 388.

(a) *Cont. ante*, C. 392. *Post*, C. 401. and see Harg. Co. Litt. 155 a. n. (3). *Tredymmock v. Perryman*, Cro. Car. 259. *Smith v. Boucher*, C. T. Hardwicke, p. 65. *Bedford v. Alcock*, 1 Wilson, 248. *Lomax v. Armorer*, 3 Kebl. 326. *Aike v. Hunkin*, 1 Sid. 233. *Anon.* 1 Ventr. 113;

SHORCROSSE v. BLAND.

Semb. S. C. 1 Ventr. 249. 3 Keb. 254-7.

( C. 394. )

ERROR to reverse a judgment in the Court at Shrewsbury.

1st Exception:—It is alleged, that upon two *Nichils* returned a *Capias* went out; which ought not to be in an inferior court, in an action upon the Case, *per stat.* 19 H. 7.

The irregular issuing of a *capias* in an inferior court, is cured by appearance. 2 Ld. Ray. 1543.

*Ans. Per Curiam*:—When the party hath appeared and pleaded, that is no exception. *Yelv.* 158.

*Post*, p. 319, 468. *Cowp.* 21. 1 Saund. 90, note (1). A *ward* is a good venue, especially if alleged to be within a vill. *Quære*, Cro. El. 260. Where there is enough written at length in a *venire* to shew that it is right, an &c. may be used. *Sed vid.* *Style* *Prac.* Reg. 370. 2 Lilly Ab. 138.

2d Exception:—The *Venire fa'* is *de warda S. in villa de S.* whereas a *Venire* ought not to be from a ward.

*Hale*:—*De vicineto de King-street* is good, and so is *de vicinet' de White-hall*, for they shall be intended vills (a). And he said he knew no reason why *de vicinet' de warda* should not be good, especially when it is alleged to be within a vill; for it is less than the vill; but he said, there have been opinions to the contrary. *Vide* Cro. Car. 165. 2 Cro. 222. *Yelv.* 158.

3d Exception:—The *venire facias* is *12 liberos et legales homines de vicineto de warda del, &c.* whereas it ought not to be with &c. in an inferior court.

*Ans.* If so be it be so much at large, that it appear the *venire* is right, though there be &c. for the rest, it is well enough. *Sed ad secundam except' advisare volumus*.

(a) *Vid.* 1 Ventr. 119. *Ante*, p. 228.

FLEMING v. FUDGE.

S. C. *ante*, p. 315.

( C. 395. )

It was said by way of recital of letters patent granted in the 24th year of the reign of Queen Elizabeth, Queen of Eng-

Surplusage.

land, Scotland, France and Ireland. *Per Curiam*:—Scotland is surplusage, and it is good for the rest.

(1) *Ante*, C. 322 b. 390.

2d Exception:—The *venire fa'* is *præceptum est*, and it is not said *per Curiam* (1). *Semble q' est error*. 1 Rol. 799.

[ 319 ]

( C. 396. )

DELBRIDGE v. FAME.

Judgment in *assumpsit* in an inferior court reversed, because the matter pleaded was not triable there (a).

ACTION upon the case in an inferior court, viz. a Borough-court; in consideration the plaintiff would go to the assizes, and be a witness for him, he would bear his charges. Error, because it appears that it could not be tried in the Borough-court.

(a) 1 Rol. Ab. 545. Cro. Car. 571.

( C. 397. )

Hil. 1673.

Whether in a real action in an inferior court the lands must be averred to be within the jurisdiction. *Vid.* Kitch. 498, (edit. 1653).

A WRIT of false judgment was brought to reverse a recovery suffered in an inferior court.

Exceptions taken were,

*Obj.* 1. Because it was *de tenementis in Rumford*, and doth not say *infra jurisdictionem*.

*Ans.* There is a difference between personal actions and real actions; for personal actions that are transitory must be alleged *infra jurisdictionem*, but in real actions it need not.

*Obj.* 2. It is said *ad Curiam tent' coram ballivis et A. and B. sectatoribus*, and doth not name the bailiffs. Dy. 262.

*Ante*, p. 19, 316.

*Ans.* The bailiffs are but the ministers of the court, and not the judges, and so need not be named. *Sed per Vaughan*: When it is said, *Cur' tent' coram ballivis*, they shall be intended judges. *Sed quære et vide* 35 H. 6, 35. 11 H. 6, 10. 3 H. 4, 14. 6 Co. *Jentleman's case*.

*Obj.* 3. There is an imparlance *ad proximam Cur' tent'*, and doth not say *scil.* such a day. 1 Roll. Continuance, 484.

*Acc.* Cowper, 21. *Ante*, p. 318. *Post*, p. 468.

*Ans.* Admitting that it be an error, yet all errors of that nature are salved by the party's appearance. 38 Ed. 3, 2. Bro. Continuance, 48. 2 Cro. 284.

( C. 398. )

HARLAND v. COOKE.

Continued from p. 317.

NUDIGATE *pro def'* argued much from the authority of a county palatine, and said, that it had *Dominium Regale*: It had forfeitures for high treason. Dy. 288. Davis, 59, 61. 4 Inst. 266. And though it be called the County-court, yet, by custom, it may be a Court of record, as the Sheriff's Court of London is. 2 Inst. 218(a).

The bishop of Durham did formerly nominate the judges there. Hob. 139.

(a) That the courts of counties palatine are not inferior courts, see 1 Saund. 73. 1 Lev. 208. Gilb. Com. Pl. 190.

\* *Obj.* A custom in an inferior Court to take out a *Capias* without summons is a void custom, and more than they do in those Courts at Westminster.

A *capias* without a summons is good by custom. *Ante*, p. 314.

*Ans. Per Vaughan, C. J.*—It may be good by custom, for every custom supposes an act of Parliament, or a law made in former times by an equivalent power; though it were not called a parliament; therefore, that may be good by custom, which cannot be created nor pass by grant; as the king cannot grant that land shall be of the nature of gavelkind or borough English, &c. (b).

A custom supposes an act of parliament or other equivalent law: a *prescription* supposes an original grant. *Ante*, p. 37, 64.

But every prescription supposes a grant in the beginning; and therefore that which cannot be granted cannot be prescribed for.

*Ante*, p. 185-6. 1 Vent. 387.

An act of parliament cannot enact any thing that is *oppositum in objecto*; because it is contradictory and so infeasible, and such things cannot be good by custom.

Parliament cannot enact a thing *oppositum in objecto*. *Ante*, p. 138.

(b) But it is not true that whatever parliament might have enacted is necessarily good by custom; for this in-

tendment would establish even unreasonable customs. *Weekly v. Wildman*, 1 Ld. Raym. 407.

*S. P.* p. 185.

WELD v. WIGGETT and the SHERIFF and BAILIFFS of NORWICH.—*Pasch.* 1674.

( C. 399. )

*S. C. Wells v. Wigon, Alport, &c. Carter*, 224.

THE case was, that Wigget, one of the defendants, entered his plaint in the Court at Norwich against the plaintiff; whereupon a summons was awarded against him; and upon a *Nichil* returned an attachment issued, and his goods were seized to the value of 80*l*.

Trespass does not lie against an officer for seizing the plaintiff's goods under mesne process of an inferior court, although the cause of action in the court below arose out of its jurisdiction, unless the party appeared and pleaded to the jurisdiction.

The plaintiff for this brings trespass.

The defendants justify by the process *supra*, and set forth, that cause of their action did arise within the jurisdiction, &c.

The plaintiff replies *de injuria et absque hoc*, that the cause did arise within the jurisdiction of the Court, (and traverses the cause particularly, which was a *computasset*).

The defendant upon this demurs, and for cause sets forth, that the traverse is immaterial and idle, &c.

*Quære*, if trespass lies against the plaintiff in the suit below?

The question was, supposing that the cause of action, upon which the goods were taken, did not arise within the jurisdiction, whether trespass would lie.

In this case the Court did incline, with some clearness, that trespass would not lie against the officers; because, when process issued out of the court to them, it was impossible that they could take notice where the cause of action did arise. *Post*, Case 449. 2 Roll. 560 (a).

(a) Acc. *Squib v. Holt*, ante, p. 193. *v. Martin*, post, p. 322. *Hodson v. Cooke*, *Harlande v. Cocke*, p. 817; and note (a) 1 Vent. 369. to *Stainton v. Randal*, p. 260. *Higginson*.

*Semb.* Case lies against a party for suing in an inferior court, and causing plaintiff's goods to be attached, knowing that he had no cause of action within its jurisdiction (b).

Case lies for taking an excessive distress upon an attachment to enforce appearance.

By the custom of inferior courts, goods attached are forfeited on non-appearance, if the party was summoned.

A new grant from the king, taken by a corporation under a new name, will not destroy an antient court (f).

And they seemed to incline, that trespass would not lie against the plaintiff there (c); but they said the plaintiff here \* might have had an action on the case, and declared, that he, knowing he had no cause of action within the jurisdiction of the Court, did cause his goods to be attached.

But they said, the proper way had been for the party to appear there, and plead to the jurisdiction, if the cause of action did not arise within it.

And they said, if a man takes an excessive distress upon the attachment, which is only to enforce an appearance, an action upon the case lies against him (d).

*Windham* said, this differed from the case of the Marshalsea, for there it is not set forth that the party was of the king's household.

And it was said, that by the custom of those Courts, if the party doth not appear upon the return of the attachment, the goods are forfeited: [Bro. Forfeit, No. 3, 4, 5.]: *Per Windham* (e).

But *per Vaughan*,—If the party be not summoned, the goods shall not be forfeited.

If a Court hath been held time out of mind, and then the corporation take a new grant from the king, and by a new name, yet this doth not destroy the antient Court.

(b) See *Hodson v. Cooke*, 1 Vent. 369. *Anon.* 2 Show. 374. *Goslin v. Wilcock*, 2 Wilson, 302. *Temple v. Killingworth*, Carth. 189. *Gwinne v. Poole*, 2 Lutw. 1569, 1570. *Higginson v. Martin*, post, p. 324.

(c) Acc. Lutw. 1568-9. *Truscott v. Carpenter*, 1 Ld. Ray. 229. But see cont. post, *Higginson v. Martin*, p. 322-3, and the cases cited in *Stainton v. Randall*, ante, p. 260, note (a).

(d) See *S. C. Carter*, 225. *Hargrave v. Ward*, Lutw. 1457. *Brigs v. Colling-*

*son*, 6 Mod. 70-1. *Swindell v. Bretnall*, cited in Com. Dig. Process, D. 6. *Moir v. Munday*, Sayer, 184. *Moore v. Taylor*, 5 Taunt. 69. *Dekins's case*, post, p. 373.

(e) See Cro. El. 18. Cro. Jac. 255. Cart. 225. Kitchen, 155, ed. 1653. 3 Bl. Com. 280. Willes, 530. Gilbert on Distresses, by Hunt, p. 19, &c.

(f) See *Luttrell's case*, 4 Co. 87. 1 Saund. 344, and note (1), *ibid.* *Mayer &c. of Colchester v. Seaber*, 3 Burr. 1866. Com. Dig. Franchises, F. 9, and G. 5. *Adney v. Vernon*, 3 Lev. 243.

( C. 400. )

WATSON v. PARSONS.—*Mich.* 1674. B. R.

S. C. 3 Keb. 361.

In trespass for taking goods, defendant cannot plead several attachments as to all. A custom in an inferior court to detain goods upon attachment till the owner give security to satisfy the plaintiff's debt, is bad. 7 Viner, 194.

TRESPASS for taking his goods.

The defendant justifies by virtue of four several attachments out of Bloomsbury Court, and sets forth, that the custom there is, upon such attachment, to detain the goods till the owner give security *ad satisfaciendum* the plaintiff *de debito*.

Resolved, 1. The plea is *duplex et multiplex*, because every attachment goes to the whole, unless he had pleaded severally, that, by virtue of such an attachment, he took such particular goods, &c.

2. Resolved the custom was unreasonable.



(C. 400 b.)

If a man declare upon an *Indebitatus assumpsit infra jurisdictionem Curiae pro mercimoniis venditis*, and doth not say, that the wares were sold *infra jurisdictionem Curiae*, it is error; though *Wylde* said, his judgment was always to the contrary, but precedents had been so.

*Ante*, p. 104, 214, 317.  
1 Rol. 545, 546.

[ 322 ]

TOMKINS'S CASE.—*Trin.* 1675. B. R.

(C. 401.)

WRIT of error. It was held to be error, if he doth not set forth how the Court was held. 1 Rol. 795. *Phillips v. Gundy* (a).

A trial by six jurors is not good, even by special custom. *Ante*, p. 317-8.

And it was likewise held, that a trial by six jurors is not good, although a special custom be alleged first. Cro. Car. 259. *Ante*, Case 392.

*Juratores triati*, and doth not say *exacti*, naught; because they ought not to appear voluntarily.

(a) *Delbridge v. Pentyer*, *ante*, p. 315.

HIGGINSON v. MARTIN and HADLEY.—*Pasch.* 1677. B. C.

(C. 402.)

S. C. 2 Mod. 195. Bull. Nl. Pri. 83.

ASSAULT and imprisonment *donec* he paid 20*l*.

The defendant justifies by virtue of a recovery in the Court of Warwick, and by process upon that recovery.

The plaintiff replies, that the original cause of action did not arise within the jurisdiction of that court.

The defendant rejoins, that the plaintiff in that court had alleged it to be within the jurisdiction, and that the plaintiff here had appeared and pleaded to it, and so had admitted it, &c. and demands judgment.

The plaintiff demurs.

In this case it was held *per Cur'*:

1. That as to Martin, who was the officer, judgment ought to be given for him without question; for it was impossible for him to know, whether the fact were done in the jurisdiction of the court or not.

The party to a suit in an inferior court cannot justify under a recovery there and process of execution, if the cause of action in fact arose out of its jurisdiction, although the defendant below appeared and pleaded to the merits. But the officer of the court may justify, if the declaration below alleged a cause of action arising within its jurisdiction; otherwise not.

The admission of the party cannot give jurisdiction to an inferior court, nor estop him from afterwards denying it.

But it was sufficient for him, that it was so alleged (a); but if it had not been averred so in the declaration in that Court, then they all agreed [and they cited the case of *Squibb and Holt*, *ante*, C. 197.], that the officer would have been liable to this action; because then all had been *coram non jndice*, like the case of the Marshalsea; for there it was not alleged, that either party was of the king's household.

2. But the great question was concerning the other defendant, who was the plaintiff in the Court at Warwick, whether or no the plaintiff here should now be admitted to say, that the original cause, for which the action was brought in the

(a) The averment in the declaration below is not sufficient in a justification by the party. 3 Lev. 243-4. Bull. N. P. 83. 4 Taunt. 48. *Sed vid.* Cowp. 20. Sayer, 82. 3 Term Rep. 185. 1 Saund. 92, n. (2).

[ \* 323 ]  
1 Rol. 809.

(1) *Ante*, p.  
294. 2 Inst. 602.

The plea and  
rejoinder make  
but one defence.  
2 Mod. 197.

Matter of ag-  
gravation insert-  
ed in the count  
in trespass,  
will not make it  
variant from the  
writ. March. pl.  
107. Com. Dig.  
Pleader, C. 13,  
14, 15. *Id.*  
Abatement,  
G. 8.

court at Warwick, was not within the jurisdiction of that court, when he had appeared there and pleaded, and \* admitted the jurisdiction there. And *per North* and *Windham* he may; for his admission will not give them a jurisdiction where they ought not to have it (b). And *North* said, that if a defendant will appear there and plead, where they have no jurisdiction, yet any body may inform this Court or the King's Bench (1), and they shall be prohibited. But *Atkins* and *Scroggs* doubted, whether or no the party, who was defendant in the court, and had appeared to the action, and admitted the jurisdiction, shall now come to intitle himself to an action, and aver, that the matter was not within the jurisdiction, when, if it were not, he had a proper time to have pleaded it there, and if he cannot aver that, then the other defendant must have judgment too. *Sed advisare volunt.*

And although here the defendant had omitted in his plea to allege, that the plaintiff in the court at Warwick had averred it to be within the jurisdiction of the court, yet the plaintiff giving him opportunity to shew it in his rejoinder, it was held well enough; because the plea and rejoinder are but one defence.

Another matter was moved, that here was a variance between the writ and the declaration; for the writ was for an assault and imprisonment only, and the declaration was for assault and imprisonment *donec* he paid 20s. But the Court held that to be well enough; because the crime was the same, and the *donec* was but by way of aggravation of damages; and it might have been given in evidence, if it had not been averred (c).

Afterwards, Term. Trin. 1677, judgment was given for the officer *prout supra*: but as to Hadley, who was the plaintiff in the inferior court, judgment was given by *North*, *Windham* and *Atkins*, against him; for although the officer could not take notice, (it being alleged in the declaration to be within the jurisdiction of the court,) that it was without; yet the plaintiff himself shall be bound to take notice of it; and though the defendant did not take advantage of it there, yet he shall not be estopped to do it here, by admitting a matter in an inferior court in a cause that they had not jurisdiction of (d).

But *Scroggs* was *e contra*; because there was a judgment in being, and so long as that continued in force it should pa-

(b) That admission will not give jurisdiction to a limited court, see *Endike v. Steed*, *ante*, p. 295. *Squib v. Holt*, p. 194. *R. v. Commissioners of Sewers for Somerset*, 7 East, 80. *Green v. Rutherford*, 1 Ves. Senr. 471. *Briscoe v. Stephens*, 2 Bing. 213. See the distinctions taken in *Lucking v. Denning*, 1 Salk. 201-2. and see *Herbert v. Cook*, Willes, 36-7, note (a).

"*Privatorum consensus judicem non facit eum, qui nulli præest judicio: nec quod is statuit, rei judicata continet auctoritatem.*" Cod. lib. 3, tit. 13, 3. *Fid.* Dig. lib. 5, tit. 1. And see *Kames's Historical Law Tracts*, 242, 245, 2d edit. *Ersk. Inst. B. 1, tit. 2, § 15-6-7-8.*

(c) 2 Salk. 642-3. 1 Stran. 61. Bull. Ni. Pri. 89.

(d) *Hardr.* 480. 1 Salk. 201-2.

tronize those that acted under it, till it were reversed by writ of error.

\* But *North* said, that would not alter the case; for there was a judgment in the case of *Richardson and Barnard*, 1 Rol. Rep. 810. [ \* 324 ]

And whereas several cases were cited, that an action would not lie for suing in another court, though the party had no cause of action (2). 2 Cro. 133. Cro. Eliz. 836:

But *North* said, the action here is not for suing in another court, but here it is for imprisoning the party. (2) *Ante*, p. 320-1. *Post*, C. 403.

Though an action be transitory as to its nature, so as it may be alleged in any county in these courts, yet that will not give an inferior [court] jurisdiction, unless the cause do really arise within the jurisdiction (e).

A transitory action cannot be brought in an inferior court, unless the cause really arose within its jurisdiction. 1 Rol. Ab. 545.

(e) See further, on justifications by parties or officers of inferior courts, *ante*, p. 193, 260, 294, 320, and the references, *ibid.* and also *Lucking v. Denning*, 1 Salk. 201-2. *Gwinne v. Poole*, 2 Lutw. 935, 1560, &c. *Moravia v. Sloper*, Willes, 30. *Evans v. Munkley*, 4 Taunt. 48. *R. v. Danser*, 6 Term Rep. 245. Buller, N. P. 82-3. Com. Dig. Courts, P. 15. Bac. Ab. Sheriff, (M), 2.

## CASES IN SCACCARIO & CAMERA SCAC'.

TRAVERSE v. DAWES.—*Trin.* 1673.

( C. 403. )

AN action upon the case was brought by the plaintiff, for that the defendant had caused him to be arrested, &c. falsely and maliciously, whereas he knew he had no cause of action against him. After a verdict the plaintiff had his judgment: whereupon a writ of error was brought in the Exchequer Chamber; and the question was, whether the action would lie or not? And upon the plaintiff's part in the writ of error were cited Dy. 285. Cro. Eliz. 836, that for an action prosecuted in the proper court, no action of the case would lie, though it were without cause; and of that opinion was *Vaughan*, C. J. of the Common Pleas, and Baron *Turner*. But *Hale*, C. J. and the Chief Baron *et alii e contra*; for here when it is \* found that the plaintiff did falsely and maliciously prosecute this action, certainly it is a good cause of action; for the jury could not have found for the plaintiff, unless they had found the malice as well as the falsity; and therefore (by *Hale*, C. J.) if they had any probable cause, they were always allowed to give it in evidence; and if a man had not this remedy, he might be many times causelessly oppressed; for he may be arrested for great sums that perhaps he cannot find bail for, and so must lie in prison; wherefore, by the consent of the Lord Chancellor, Chief Justice, and Chief Ba-

An action on the Case lies for maliciously suing the plaintiff, and causing him to be arrested, when the defendant knew that he had no cause of action. *Ante*, p. 29, 320, and last case.

[ \* 325 ]

ron, judgment was affirmed. *Vide* Hob. 267. 4 Co. 14. Winch. 28, 54. 2 Cro. 432 (a).

(a) In what circumstances an action lies for a malicious and vexatious suit, see further *Atwood v. Monger*, Styl. 379. *Dawe v. Swayne*, 1 Mod. 4. S. C. 1 Lev. 275. *Skinner v. Gunton*, 1 Saund. 228. *Hodson v. Cooke*, 1 Vent. 369. *Webster v. Haigh*, 3 Lev. 210. *Anonymous*, 2 Show. 374. *Norris v. Palmer*, 2 Mod. 52. *Savil v. Roberts*, 1 Salk. 13. S. C. 1 Ld. Ray. 380. *Temple v. Killingworth*, Carth. 189. *Neal v. Spencer*, 12 Mod. 257. *Gwinne v. Poole*, 2 Lutw. 1569, 1572. *Bird v. Line*, Comyn Rep. 190. *Jones v. Givin*, Gilb. Cases, 197. *Goslin v. Wilcock*, 2 Wilson, 302. *Smith v. Cattle*, *ibid.* 376. *Purton v. Honnor*, 1 Bos. & Pull. 205. *Gibson v. Chaters*, 2 Bos. & Pull. 129. *Page v. Wiple*, 3 East, 314. *Arundell v. White*, 14 East, 216. *Sinclair v. Eldred*, 4 Taunt. 7. Buller's Ni. Pri. 11-2-3. Bacon, Abr. Action on Case, (H). Viner, Ab. Action, (H), c.

and see note (4) to Co. Lit. 161 a. which Mr. Hargrave concludes in the following words. "No man is actionable for *merely suing*, whether in a criminal or civil form, however false the suit may be in foundation; nor is otherwise punishable, except in the case of a civil suit by the payment of costs. But if the suit be *malicious* as well as *false*, it is on that account punishable; sometimes by indictment or information, as in the case of a conspiracy; sometimes by immediate fine and imprisonment in the Court in which the malicious suit is carried on, as in appeals of felony or mayhem, or in attain; and sometimes by action of the party sued, as where a damage can be proved, or where from the grossness or criminality of the charge or imputation the law supposes a damage to be inevitable."

## ( C. 404. )

## VERNON v. YEEDS.

If the bill on the file and imparlance roll be right, the issue roll or Ni. Pri. record may be amended by them, if the issue be not altered thereby. Het. 148. Latch, 164. Bac. Ab. Amendment, (D), 2, 3, 4.

TROVER, and the conversion alleged to be in London, and the trial was in Middlesex; but it seems, the declaration upon the file was of a conversion in Middlesex, and the imparlance roll was right, and so was the issue roll, but the *Nisi Prius* roll was wrong; whereupon the plaintiff prayed, that the *Nisi Prius* roll might be amended.

*Hale, C. J.*:—If the bill be right upon the file, and the imparlance roll right, the issue roll or the *Nisi Prius* may be amended by them, for they are but transcripts of the other; but if the difference be such as to alter the issue, there they cannot be amended; for then it is another thing that is tried than ought to be tried.

## ( C. 405. )

HARLING v. CANNON.—*Pasch.* 1674.

A general pardon intervened between the time of importing gloves contrary to 3 Edw. 4, c. 4, and the time when they were found in the defendant's hands for sale: *quære*, whether the pardon discharged the forfeiture?

INFORMATION for importing gloves *contra* Stat. 3 Ed. 4. cap. 4 (a).

The case was, that the gloves were imported before the 25th of March, to which time the general pardon extends, by which all unlawful importations are pardoned; and in April following the said gloves were found in the hands of the defendant to be sold.

The question was, whether this forfeiture was discharged by the general pardon intervening between the importation and the finding them to be sold?

1. Here it was admitted, that a man might import any of those commodities mentioned in the said statute for his own

(a) Repealed, *vid.* 56 Geo. 3, c. 36. *Attorney-General v. Saggars*, 1 Price, 182.

use, or he might give them away, and it should be no forfeiture (b). the party's own use, or for

\* But as to the principal point, the barons were divided. [ \* 326 ]

*Turner*, Chief Barón, held, that the forfeiture was not gone by the pardon; for he said, the importation is not unlawful, and by it there is no offence against the statute; but it is the selling, or design to sell, which gives the forfeiture. giving away, is not within the statute.

But the other Barons seemed to be of the contrary opinion; in as much as the selling is not the principal offence, but it is *evidentia facti*, that the importation was to that intent, and so the importation being pardoned, the goods should not be forfeited.

And *Thurland* compared it to the case, where a man is struck and dies a week after, the death shall have relation to the stroke. Plowd. 401.

And *Sawer* put the case, supposing these goods had been seized, and then the king had restored them, there; or suppose the king had released to the party, they should never be forfeited by any after sale again, notwithstanding the statute saith, "as often and every time they may be found, &c."

(b) *Chapman v. Lamb*, 2 Stra. 943. *Dyson v. Villiers*, Bac. Ab. Smuggling, (F), 7.

### THE SHERIFFS OF LONDON v. PRETTIMAN.—*Mich.* 1674. ( C. 406. )

ONE Thody being indicted for killing a man, the sheriffs of London seize his goods before conviction, and Prettiman covenants with them, if they would leave the goods in his house, that if Thody were found guilty, he would deliver them the goods, or otherwise pay them 300*l*. The goods of one indicted for felony may be inventoried by the sheriff before conviction, but not removed; and he may lawfully take security from any one, that they shall be forthcoming upon conviction. 1 Hale, H. P. C. 364, 367.

And here it was objected, that this covenant was void; because it was taken by the sheriff *colore officii* in a case where he had no such power; for he ought only to take an inventory of the goods.

And obligations or covenants in such cases are void at common law, as well as by the statute 23 H. 6. Plow. 67. 10 Co. *Bewfage's* case; Hob. *Norton* and *Syms*, as bonds *pro favore seu easiamento*, and bonds upon bailing one that is notailable; as was resolved in Sir *J. Norfolk's* case, 19 *regis nunc* (1). And the sheriff at common law ought not to seize the goods of a person indicted for felony, but he might inventory them; but the party's wife and children were to be maintained out of them; and so is the statute of 1 R. 3, 3. 3 Inst. 228. (1) S. C. 1 Lev. 209.

*Sawer pro quer'*:—At the common law the sheriff might seize them after indictment, and put them into the hands \* of the neighbourhood; and so is 7 H. 4, 47; and the statute of R. 3, is intended only when a man is arrested for suspicion of felony, his goods shall not be seized; and so it is expounded by 3 H. 7. [ \* 327 ]

And he said this statute of 1 R. 3, is a private law, and

(2) *Ans.* C. 113, ought to be pleaded, and 23 H. 6, is adjudged so (2). *Sed* p. 101, note (a). *Cur' e contra.*

*Per Cur' semble,* that after indictment the sheriff may inventory, but not remove the goods of the party; and if any one will secure them, that they shall be forthcoming, it is lawful for the sheriff to take such security. *Sed adjournatur.*

( C. 407. )

SIR JOHN READ'S CASE.—*Pasch.* 1676.

S. C. 2 Mod. 299.

To an information for exercising the office of sheriff without receiving the sacrament according to the test act, it is no defence that the party is disabled to receive it by excommunication for disobedience to a sentence of the Spiritual Court.

SIR JOHN READ was made sheriff in the 26th of this king, and executed the office for three months, and then gave it off, pretending that the office was void by the statute of the 25th of this king, which enacts "That all officers that do not receive the sacrament and take the oath according to that statute within three months, that the office shall be void, &c."

Whereupon an information was exhibited against Sir John Read, for not taking the sacrament according to that statute, &c.

Upon not guilty pleaded the jury found, that, before the time of the making of the statute and his being made sheriff, his wife had recovered alimony in the Spiritual Court, and for not obeying the sentence there he was excommunicated, and thereby incapable of receiving the sacrament, &c.

The first objection was made against the form of the statute, because here is an information for that which is made penal by a statute, and it doth not conclude *contra formam statuti*; for it was agreed, that if an act of parliament creates a new offence, which was not so at common law, the information or indictment must conclude *contra formam statuti*. 9 H. 6, 2.

*Post*, Case 509. But Mr. *Solicitor* took this difference, that where an offence was at common law, but a statute adds a farther penalty, there the party hath election to proceed either at common law or upon the statute; but if he intends to punish the party according to the statute, there he must conclude *contra formam statuti*; and so upon the statute of 5 Eliz. 9. 5 Eliz. 14, for perjury and forgery, the parties may be punished either at common law or upon the statute.

[ \* 328. ] \* *2d Obj.* It is not averred in the indictment, that he did neglect taking the sacrament *ed intentione* to incapacitate him for his office.

*Ans.* Where a thing is necessarily unlawful, there it is needless; but if a thing may be lawful or unlawful, according to the circumstance, there it is necessary to aver it; as in conspiracy, it must be said *falsò et malitiosè*, because an indictment is lawful in itself.

Willes, 584.  
2 Rol. 82.  
*Post*, p. 431.

But if a man say of a Judge, "That he takes bribes," or that an attorney is a "champertor," there it is not necessary to say *falsò et malitiosè*, for these do necessarily imply evil.

*Obj.* It is found, that he was excommunicated, and thereby became incapable.



*Ans.* The finding of his being incapable is no more than what the law infers upon his excommunication, and therefore that shall have no influence.

*Obj.* The law doth not force any man to capacitate himself to be an officer; as upon the statute of H. 6, a justice of peace is punishable if he have not 40*l. per annum*, but a marshall not be compelled to purchase 40*l. per annum* that he may be capable of it. 2 Cro. 643.

*Ans.* It is found here, that he accepted the office for three months, and took his oath, and then he shall be bound to go through with it.

But to that it was answered by *Sawer*, that he was bound to execute it as long as he could, or else he had been deservedly punished.

*Obj.* When an act of parliament avoids an office, or creates a disability in the person to hold it, that is not qualified according to the office, there that is the punishment of the party, and he shall not be punished in any other manner; as upon the statute of 13 Eliz. for not reading the articles; and 5 Ed. 6, buying of offices; there the parsonage and the office shall be void; but it was never heard of, that an information or an indictment lay for them; and so for simony.

*Ans.* Where the offices are offices of benefit, there the loss of the office is a punishment; but this is an office of charge.

And the mischief, if this were allowed, would be very great; for then a man might procure himself to be excommunicated for not paying some petty tithes, and so avoid the serving of sheriff, which is an antient office; as appears 2 Inst. 559. Fortescue, cap. 24, fo. 53.

And *Sawer* took a difference, where the words of the act are, "That the office shall be void," and "forfeited;" for by the word "void" they are absolutely void, without more ado, for that is executed. But if the expression is "forfeited," there it is executory, and must be avoided.

But it was much insisted upon for the king, that this was a voluntary disability, and that shall be looked upon as none at all, for here the party might submit himself, and be absolved.

But to that it was answered, that in law *Causa proxima non remota spectatur*; and it may as well be said, when a man is in prison for debt, he may pay his debts; and though in philosophy they say *causa causæ est causa causati*; yet in law the immediate cause is respected. *Curia advisare vult*. [See the judgment in 2 Mod. 303.] (a).

(a) See *Mayor &c. of Guildford v. Clarke*, 2 Vent. 247. *Rex v. Larwood*, 1 Ld. Raym. 29. S. C. 1 Salk. 167. *Rex v. Grosvenor*, 1 Wils. 18. S. C. 2 Stran. 1193, and the case of *The Chamberlain*

of *London v. Evans*, Cowp. 393, 535, and 2 Tyrwhitt's Burn's Ecc. Law, 2 Vol. p. 207—220. 6 Bro. Parl. Cas. 181. S. C.

12 Co. 78.

6 Co. 29.

[ \* 329 ]

Lutw. 910.

1 Hawk. P. C.

B. 1, c. 8, § 3.

Post, p. 475-6.

1 Ld. Ray. 33.

Bac. Max. reg. 1.

[NOTE.—The notes to the cases in the seven following pages (with the exception of C. 413,) are borrowed from the Appendix to Mr. HOVENDEN's edition of the 2d Part of Freeman's Reports. Editor.]

## ( C. 408. )

Pasch.—1679(a).

Tithe of agisted cattle, if unprofitable, shall be paid by the owner of the ground; if profitable, by the owner of the cattle.

If a man agist cattle, such as are unprofitable, and yield no tithe in kind, as horses, &c. there the party that taketh them in, viz. the owner of the ground (b), shall answer the parson the tithe, according to the rate he hath for their depasturing (c).

But if a man agist profitable cattle, and such as yield a tithe in kind, as sheep (d) that yield tithe wool, and lambs, there the owner of the cattle shall answer the tithes, because the wool and lamb in kind were due to the parson, and it is impossible that the owner of the ground could pay that. This difference was taken by Sir Robert Sawyer, and agreed *per Cur'*.

(a) We learn from 1 Rayn. 54, that this case, though reported separately, was only one point of the case next following.

(b) *Facey v. Lange*, 1 Roll's Ab. 656. *Scarr v. Trin. Col. Camb. & Wood*, 3 Anstr. 764. *Underwood v. Gibbon*, Bunb. 3. *Fisher v. Leman*, 9 Vin. Ab. 38. *Kershaw v. Isles*, Gwill. 659. See, however, *Coe v. Smith*, Gwill. 577.

(c) *Holbeche v. Whadcocke*, Hardr. 184. *Guilbert v. Eversley*, ib. 35.

(d) See *Marshall v. Price*, 1 Roll's Ab. 642. *Turner v. Williams*, 3 Anstr. 829. *Gibbs. Codex*, 677. *Smith v. Johnson*, 1 Bunb. 1. *Bateman v. Aistrap*, Rayner, 658. *Howes v. Carter*, 2 Anst. 501. *Coleman v. Barker*, Gilb. Eq. Rep. 231; the result seems to be, what reasoning *a priori* would, probably, lead to: viz. that, where a mixed tithe is payable by the owner of the farming stock, a predial tithe is not due for the herbage, or other green food consumed by that stock: with this qualification, that the mixed tithe must be paid in the same

parish where the stock was depastured; or an agistment tithe will also be due to the parson of that parish, who, otherwise, might be defrauded of tithe altogether. *Ellis v. Saul*, 1 Anstr. 341. 3 Burn Ecc. L. 472. And this qualification must itself be limited, so as not to include the case of an occupier of a farm in one parish, who prescribes for certain common of pasture on land in another parish, upon which sheep are occasionally agisted; and that tithe wool, or other satisfaction, has been immemorially paid to the rector of the parish where the farm and homestall are situated; in such case, the right of common is reputed *part of the farm* to which it is *appendant*; and no agistment tithe is payable in respect thereof, to the parson of the parish within the local boundaries of which the common is included. *Ellis v. Fermor*, Gwill. 1022. If the right of common were *en gross*, that is, annexed to the person, not appurtenant to land, agistment tithe would be due where the commonable land is situated. *Ibid.* 1027.

## ( C. 409. )

DOD v. INGLETON.—Mich. 1679.

S. C. T. Raym. 277. 1 Rayn. 54. Gwill. 527.

Tithe milk should be delivered by the parishioner at the church porch. *Vid. Com. Dig. Dismes*, H. 8.

THE question being, whether tithe milk should be brought home to the vicar, or whether he ought to send for the same to every parishioner, there being no custom either for the one or the other?

The Barons having taken time, since the last term, to consider of this point, delivered their opinions *seriatim*:

*Montague, Atkins* and *Gregory*, were of opinion, that there being no custom in the case, they ought to respect the conveniency of the matter; and therefore it being the usage in that country to bring their tithe milk, and other small tithes, to the church-porch, they thought that the parishioners ought to bring their small tithes thither, \*it being an indifferent place for that purpose, but for great tithes the parson ought to fetch the same.

*Raymond* was of opinion, that tithes being due by the ecclesiastical law, according to which law small tithes are to be carried home to the vicar's house, therefore he was of opinion, that this Court ought to adjudge it so too (a).

(a) Later cases have decided, that where there is no custom to the contrary, the parson must fetch his tithe milk from the usual place of milking. *Dodson v.*

*Oliver*, Bunb. 73. *Carthew v. Edwards*, Rayner, 449. *Bedle v. Miller*, cited Gwill. 969.

[ \*330 ]

#### CLIFFORD v. FRANCIS.

( C. 410. )

A MAN devises the surplus of his estate, after debts paid, to his executors, to be disposed by them to pious uses: the question was, whether the commissioners for charitable uses had power of this? And the Court took this difference:

That when money is given to a charity, without expressing what charity, there the king is the disposer of the charity, and a bill ought to be preferred in the Attorney-General's name for that purpose.

But if the charity be expressed, there it is in the power of the commissioners for charitable uses (a).

When money is given to a charity, generally, the king shall have the disposition: if the charity be expressed, the commissioners for charitable uses have authority. 2 Lev. 167. 2 Fonbl. Eq. B. 2, P. 2, ch. 1, sec. 3.

(a) In *Moggridge v. Thackwell*, 7 Ves. 74, 86, this case is cited; and the decree there made, which was afterward affirmed in the House of Lords, was in

conformity to the distinction laid down in the text. See, also, *Paice v. Archbishop of Canterbury*, 14 Ves. 372. 2 Freem. p. 262, C. 330 b.

#### MANNING and MANNING.—Mich. 1682.

( C. 411. )

A BILL was preferred for a distribution, upon the act concerning intestates' estates, and to discover a trust of some money put out by the defendant, for the intestate, in his own name. Upon a demurrer, the Court resolved, that they would give no relief, so as to make a distribution, because it was an authority given by act of parliament to the Ecclesiastical Judges, and limited particularly to them; and although there were no negative words in the act, yet it being a thing newly created, which was not at common law, they would not hold plea of it any farther than to discover the trust or fraud, in case there were any. Of a legacy they will hold plea, because due at common law, but not of dilapidations: and they gave the same resolution in the case of one *Sawbridge*.

Equity will not enforce distribution of intestate effects. *Sed vid.* 2 Ventr. 362. 2 Ca. Chan. 95.

But it was alleged, that my Lord Chancellor doth constantly decree a distribution (a).

(a) An executor, or administrator, being considered, in equity, as a trustee, upon this ground a bill in equity may be brought to enforce the execution of the trust; *Wind v. Jekyll*, 1 P. Wms. 575; which the Spiritual Courts have not the means of doing. *Farrington v. Knightley*, *ibid.* 548.

[ 331 ]  
( C. 412. )

Hil.—1690.

A. mortgaged to B. in trust for C., and then confessed judgment to D., and afterwards mortgaged again to C.: the judgment creditor D. was allowed to redeem on payment of the first mortgage only.

A. MORTGAGETH to B. in trust for C. and then confesseth a judgment to D. and afterwards C. lends him more money, and takes another mortgage of the same estate in his own name (a).

D. the creditor by judgment having extended the lands, preferred his bill to be let in to redeem, upon payment of the money due upon the first mortgage: and the sole question was, whether he should be let in without paying off both the mortgages?

And by *Atkins, Nevill* and *Letchmere*, he shall redeem upon payment of what was due upon the first mortgage only; for when the judgment was acknowledged, he had a right to the equity of redemption prior to the second mortgagee, which could not be taken from him by any act of the mortgagor.

But *per Turton e contra*; that he shall not redeem, but upon payment of both; and it is the common practice, for the last mortgagee to take in the first mortgage, and by that means to protect himself against all subsequent mortgages; and it was admitted by the counsel of the other side, that if a purchaser takes in the first mortgage, that shall protect him in his purchase; but they distinguished, where it is a security only, and not an absolute purchase, that they shall there take place according to their priority in time.

*Qu.* Of the resolution of the Court in this case, because it seems against the constant practice in Chancery (b); and a mortgagee is a purchaser *pro tanto* to the value of his debt, as much as an absolute purchaser.

(a) If the second mortgage was taken without notice of the judgment, the decree here made seems altogether anomalous. *Goddard v. Complin*, 1 Cha. Ca.

119. *Anon.* 2 Cha. Ca. 35. *Shepherd v. Titley*, 2 Atk. 350.

(b) *Vid.* 2 Freem. C. 13, p. 14, and notes, *ib.* 2d Ed.; also, C. 7, p. 6. *Id.*

( C. 413. ) Upon the Petition of HORNBEE, WILLIAMSON, SMITH, and STONE.—Hil. 1691.

*S. C. with the pleadings* in 5 Mod. 29. Skin. 601. Comb. 270. Carth. 388. Salk. 58. 14 Howell's Stat. Tri. p. 1.

The king may grant an annuity, chargeable upon his heredi-

KING CHARLES the Second, having taken up great sums of money of the petitioners, or their testator, who were bankers, in consideration thereof granted to them and their heirs

veral annuities, chargeable upon the hereditary revenue of excise, given to the king by the statute of 12 Car. 2, cap. 24. tary revenue, so as to bind his suc-

\* The said annuity being for many years arrear, the petitioners exhibited their petition to the Barons of the Exchequer for the said arrears; whereupon two questions did arise, [ \* 332 ]

*1st Question*, Whether this grant of the king were good to bind the successor, so as to continue a charge upon the said revenue? cessors; and the grantee has a remedy for arrears by Petition to the Barons of the Exchequer.

*2d Question*, Whether the petitioners had taken their proper remedies for recovery of the said arrears?

*Ad primam quæst'*:—*Atkins, Turton and Powell*, were of opinion, that the grant was good to charge the successor.

It was admitted, that the king could not grant away his kingdom, nor put it in vassalage or subjection to the pope or any other, as is said in 4 Inst. 13, 14, 83, 202, 357. The king cannot grant his kingdom, nor put it in vassalage or subjection to another.

That the king may grant an annuity or charge his revenue. 2 Cro. 78. 5 Co. 56. 7 Co. 21. 9 H. 7, 12. 2 Inst. 58. Vaugh. 161. 4 Inst. 29. Dyer, 92. 9 H. 6, 12. Bro. Quinz. 7. 2 Rol. 176, 198. 19 H. 6, 6. 4 Inst. 126. 6 Co. 73. 2 Rol. 98. Moor, 833. 2 H. 7, 8. Reg. Orig. 193, 266, 307. 21 Ed. 3, 47.

But it must be said of whose hands to be received, or else it is not good, for he cannot charge his person. Nat. Brev. 52. Dy. 92. Hob. 148. The king cannot charge his person. 1 Salk. 58.

*Obj.* That it was out of an incorporeal inheritance.

*Ans.* It is good notwithstanding. 1 Inst. 47.

*Obj.* It was pretended, that the king was deceived in his grant, as to the consideration.

*Ans.* If the king be deceived in a consideration real executory, it will void the grant, but not in a consideration personal executed. Plow. 454. Lane, 3, 76, 108. 10 Co. 47. 6 Co. 56. 1 Co. 43. Yelv. 1. 11 Co. 90. Hob. 230. If the king be deceived in a consideration real executory, his grant is void: but not in a consideration personal executed. Ante, C. 190, p. 178. 5 Mod. 57.

That there have been acts of resumption shews that the grants were good, because they could not be avoided but by act of parliament.

*Obj.* This is but an authority, and so void by death; because revocable.

*Ans.* It is an interest; and a licence coupled with an interest is irrevocable. Dy. 176. Nat. Brev. 223. Plow. 457. Palm. Rep. 171, 172. Dyer, 49. A licence coupled with an interest is irrevocable. Ante, p. 88, 117. 2 Barn. & Ald. 738.

*Ad secund' quæst'*:—All the Barons (a) held, that the remedy by petition to the Barons was a proper remedy, and that it was in their power to relieve the petitioners, and give judgment for them. Keilw. 178. Stamf. 73, 75.

\* A petition of right lies as well for a personal as a real due. Plow. 377, 434. *Wroth's case*, and *Nevill's case*, 9 H. 6, 13. 1 Roll. 539. Lane, 38. 4 Inst. 415. [ \* 333 ]

Baron *Letchmere e contra*:—That the king could not alien or charge this revenue. Fleta, 183. 3. 549. Selden, Grotius, Pryn, 9, 390. Vindication of the liberties of Engl. Freens. A petition of right lies as well for a personal as a real due, Vid. Somers's Argument in 14 Sta. Tri. p. 81-4. 1 Term Rep. 176.

1. It was given in lieu of a revenue unalienable but by act of parliament, viz. the Court of Wards. [5 Mod. 56.]

(a) *Quære*, whether *Letchmere*, B. held this? Vid. 5 Mod. 48.

5 Mod. 54. 14  
Howell's State  
Tri. 30.

2. If the king may alien part, he may alien all, and then the subjects will bear the burden, for they must grant new supplies to support the Crown.

3. This charge was granted by the king at a time when he had no occasion for money, but merely for to gratify his prodigality, being at a time when the parliament rained golden showers into his lap.

It appears by the answer Edward the Third gave the pope, that it is not in the power of the king to alien his kingdoms, &c. 4 Inst. 13, 14.

5 Mod. 46.

4. The very words of the act of parliament shew, that it was the intent of the parliament it should continue in the Crown unalienable, there being the words "for ever hereafter to remain to the king and his successors" several times in the act.

5. A power in the act, to enable the king to let to farm for three years, shews the parliament never intended he should have power to alien as he pleased.

6. Where the parliament intended a power in the king to alien, it is otherwise worded; as in the acts that give monasteries to the Crown it is said, "to do therewith as he pleased."

But judgment was given for the petitioners, upon the opinion of the other three Judges (b).

(b) Upon a writ of error in the Exchequer Chamber this judgment was reversed by the opinion of Lord Keeper Somers and Lord C. J. Treby, who thought that the Barons of the Exchequer were not authorized to make orders for payments on the receipt of Exchequer, and therefore that the remedy by petition to them was inapplicable: but the majority of the Judges, including Lord C. J. Holt, approved of the remedy, and the judgment of the Exchequer Chamber was itself reversed on error in Parliament. Notwithstanding this ultimate decision in favor of the petitioners, an act, 12 & 13 Will. 3, ch. 12, was soon after passed, by virtue of which they received only a composition for the whole arrears. See the case reported under the name of the *Bankers' Case* in 14 Howell's State Trials with the observations of Hargrave; and the proceedings in Parliament, *ibid.* p. 110, and 2 Lords' Debates, p. 8. On the right of alienation by the Crown, see the Tracts referred to by Hargrave in his introduction to the case in the State Trials. The argument of Treby is in 5 Mod. 46; of Holt in 5 Mod. 53, and Skinner, 601; and of Somers in a separate publication, ed. 1733, reprinted in the State Trials, *ubi supra*. The proceeding in the Exchequer seems to have been on the plea side, and was called a *monstrance de Droit*. See 5 Mod. p. 57-8, and 14 How. State Tr. p. 107. But see Ld. Somers's argument, *Ibid.* p. 76-80. In *Mac-*

*beath v. Haldimand*, 1 Term Rep. 176, Lord Mansfield says that "great difference had arisen since the revolution with respect to the expenditure of the public money. Before that period, all the public supplies were given to the king, who in his individual capacity contracted for all expenses. He alone had the disposition of the public money. But since that time the supplies have been appropriated by parliament to particular purposes, and now whoever advances money for the public service trusts to the faith of parliament. That according to the tenor of Ld. Somers's argument in the bankers' case, though a Petition of Right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the bankers' case; and parliament was afterwards obliged to provide a particular fund towards the payment of those debts. Whether however this alteration in the mode of distributing the supplies had made any difference in the law upon this subject, it was unnecessary to determine; at any rate if there were a recovery against the Crown, application must be made to parliament, and it would come under the head of supplies for the year."

Lord Somers observes in his argument "I should much doubt whether a new law for the more easy recovery of pensions granted by the Crown would be for the good either of king or people." 14 State Trials, p. 104. See *Gidley v. Lord Palmerston*, 3 Brod. & Bing. 275.



STASBY v. POWELL.—*Pasch.* 1693. 15 *May*.

( C. 414. )

A DECREE was had against the defendant's intestate by the plaintiff for 400*l.* for the profits of lands received by him; and the intestate, before the said decree, was indebted to the defendant by bond.

A decree in Equity is to be satisfied by an administrator before a bond, debt.

The intestate dying, the defendant got administration; and the question was, whether the defendant could retain to satisfy his own bond against this decree, there being not assets to satisfy both?

\* And held by *Atkins, Turton* and *Letchmere*, that he might (a); and thereupon decreed, that the defendant should pay the plaintiff, in case he had assets, in the first place.

[ \* 334 ]

*Powell dubitavit*, for that in case the party was sued at law for debt upon a bond, he could not plead nor give this decree in evidence at law, to bar the plaintiff; and so it would be one way at law and another way here. But for that it was answered, that the party might be relieved by his bill in equity and have an injunction (b).

(a) It is evident that the negative particle has been omitted here, through an oversight merely; as we are told, in the next branch of this same sentence, that the plaintiff was to be *first* paid. The privilege of retaining for a debt due to himself is allowed to an executor or administrator only as against creditors of an equal degree. *Musson v. May*, 3

*Ves. & Bea.* 197. But a decree for payment of money must be preferred, in a course of administration, to a bond debt. See *Searle v. Lane*, 2 *Freem.* 103.

(b) See *Darston v. Earl of Oxford*, in note to 3 *P. Wms.* 401, and references there given; to which add *Paxton v. Douglas*, 8 *Ves.* 521.

[Notes by Mr. Hovenden.]

*Pasch.*—1694.

( C. 415. )

MAY 11. This day Mr. *Montague* was sworn Chancellor and Under Treasurer of the Exchequer. The Lord Keeper coming up out of Westminster Hall made a speech to him to the effect following, viz.

Mr. *Montague*, the king taking notice of your diligence, fidelity and dexterity, wherewith you have served him, hath been pleased to constitute you the Chancellor and Under Treasurer of his Majesty's Court of Exchequer: it may be thought strange, that a man of your years should be thought fit for so great an office and place of trust; but when your learning and merits are considered, that wonder will cease. It was his majesty's observation of your merits only which preferred you to this place, without the recommendation of any one whomsoever; that which I wish on your behalf is, that you may answer the expectation you have raised of yourself; and I wish for his majesty's sake, that he may in all other cases make merit the measure of preferment, as he has done in this.

( C. 416. )

Mich.—1698.

S. C. Gwill. 562.

Tithe of hops.

IN a cause, where a person preferred a bill for tithes, these points were held by the Judges:

1. Where the parson had tithe hops, no tithes should be paid for the poles (a) which were used in the hop-yard. And a question arose, whether the parson should have tithes of the bark of the poles, the bark being sold? And by *Letchmere* he should. But the Chief Baron and the others *contra*; for the poles being privileged, the bark shall be so too (b).

2. That for fuel spent in fire to dry the hops tithes should be paid; because the parson had no benefit by that (c) the tithes being paid before they were dried (d).

[ \* 335 ]

\* 3. That tithes ought to be paid as soon as the tenth part can be well severed from the nine, if there be no custom to the contrary (e); and so it is for corn and hay, as soon as it is made into shocks (f) or cocks (g).

No tithe payable for any thing *per quod decimæ sunt uberiores*.

4. That for wood employed to hedge or fence corn, where the parson had tithe corn, no tithe shall be paid (h); and it was said to be a general rule, that no tithes shall be paid for any thing *per quod decimæ sunt uberiores*.

(a) To maintain this exemption, it should seem, a special custom must be established: for though it was resolved, in the principal case, that "no tithes should be paid for any thing *per quod decimæ sunt uberiores*;" yet Lord Hardwicke, C. (in *Walton v. Tryon*, 1 Dick. 245,) observes, "it would be a dangerous innovation to admit the argument, that the use for which wood is cut, determines whether it be titheable: that a case had indeed been put where the use does determine whether it is titheable; viz. where wood is cut to be burnt in the house of a parishioner; in which case it is not liable to tithe: but that is not by common right, but by special custom." *Norton v. Fermor*, Cro. Car. 113, lays down the same doctrine. Now as hops are of comparatively recent introduction into husbandry, it may be questionable whether any custom respecting them would, as against the claims of the church, be held binding; for though forty years are sufficient to establish a custom, or prescription in the Spiritual Courts according to *Saunderson v. Claggett*, 1 P. Wms. 663, and *Gibs. Cod.* 691, or at any rate fifty years according to *Drake v. Taylor*, 1 Str. 88, and *Cheeseman v. Hoby*, Willes, 681; yet here the question, if the right to tithe were disputed, must be determined in the Courts of ordinary jurisdiction, which admit no such rule. *Fleming v. Dudley*, Saville, 13. *Beake v.*

*Mayne*, there cited.

(b) Upon a similar principle it was decided, in *Ram v. Pattenson*, Cro. Eliz. 478, in *Lifford's case*, 11 Rep. 48, and in *Newman's case*, Godb. 175, that no tithe is payable for the loppings of timber trees.

(c) *Anon.* 1 Ventr. 75. *Tilden v. Walter*, 1 Sid. 447.

(d) As to hops, see the great case of *Knight v. Halsey*, 2 Bos. & Pull. 172. 8 Br. P. C. 233, Toml. edit.: for the general rules, see *Collyer v. Howes*, 3 Anstr. 956.

(e) *Mantell v. Payne*, Gwill. 1504.

(f) The common law mode of tithing corn is in the sheaf, and not in the shock: *Shallcross v. Jowle*, 13 East, 267. *Halliwel v. Trappes*, 2 Taunt. 58: And if grain has additional labor bestowed on it by the farmer, by being put into shocks, whereby it is better protected from the weather, this benefit and additional labor may constitute a good consideration for rendering the 11th, instead of the 10th, shock. *Smyth v. Sambrook*, 1 Mau. & Sel. 73.

(g) *Hide v. Ellis*, Hob. 250. *Halliwel v. Trappes*, *ubi supra*. *Newman v. Morgan*, 10 East, 9.

(h) 1 Roll's Ab. 644. *Moore*, 688. But *quære*, whether a special custom must not be shewn to support the exemption? see note (a); and *Smith v. Williams*, Gwill. 608.

5. Whether tithes shall be paid for fuel spent in the house, where there is no custom, they said they should not determine, it being no point in this case, and there being opinions both ways. Cro. Car. 113, was cited at the bar, that such fuel shall not be discharged without a custom (i).

6. That land where wood grew, and was stocked up and converted into tillage, is not such barren land as ought to be exempted from payment of tithe; but only such is intended barren land, which before the ploughing, produced no profit to the owner (k).

7. That for rakings of corn no tithe was payable, if they were involuntary; but if there was any fraud in leaving more than was necessary, that tithe should be paid (l).

8. That the parson could not justify his coming to set out tithes without the consent of the owner; because by the statute [2 & 3] Ed. 6, [c. 13,] the owner is to set out his tithes, and if he do not, he is liable to the penalty of the statute (m). The parson cannot justify an entry to set out tithes without the consent of the owner.

(i) See note (a). In *Norton v. Fermor* (as appears from the report in Hetley, 88, 110, 117,) Yelverton and Croke, JJ. thought the exemption was of common right; but Richardson and Hutton, JJ. deemed a custom to be necessary. Lord Coke seems to have been of the first opinion; 2d Instit. 652. Lord Hardwicke, as observed *supra*, held the latter; in which Parker, C. B. also concurred in *Erskine v. Raffle*, Gwill. 965. See, also, *Watson v. Smith*, 2 Keble, 634, where a special custom, not *lex terra*, was sug-

gested as a ground for a prohibition.

(k) *Beardmore v. Gilbert*, Bunb. 159. *Warwick v. Collins*, 2 Mau. & Sel. 359. 5 Mau. & Sel. 177. *Stockwell v. Terry*, 1 Ves. Sen. 117.

(l) *Nichol's case* cited, Cro. Eliz. 660. *Green v. Hun*, *ibid.* 702. *Sherington v. Fleetwood*, *ibid.* 475. 1 Roll's Ab. 645.

(m) The statute, as far as respects the setting out of tithes, is of course applicable to *predial* tithes only. *Norton v. Clarke*, Gwill. 428.

[Notes by Mr. Hovenden.]

## DE TERM. S. TRINITATIS, 1673.

[ 336 ]

IN BANCO REGIS.

BOULTON v. CANON (a).

( C. 417. )

S. C. 1 Vent. 271. Pollexf. 125. 3 Kebl. 189, 446, 466, 493.

LESSEE for years covenants *pro se, execut. administ. et assignat. suis* to pay the rent, and dies, and his executor enters, and the lessor brings an action of covenant against the executor, for rent incurred in his own time, and sets forth, that he entered into the land, and held it after the death of the testator. The executor pleads *plene administravit*, and the plaintiff demurs.

It was alleged for the plaintiff, that this was no good plea; for if an action be brought against an executor for rent incurred in his own time, he shall be charged *de bonis propriis*, and an action of debt in the *Debet* and *detinet* lies against him. 5 Co. 31, *Hargrave's case*. And it was said, that this is not like

*Semb.* In an action of covenant for payment of rent, against the defendant as executor, *plene administravit* is a good plea, although the rent incurred in his own time, and the declaration states an entry and holding by the defendant since

(a) See a case between the same parties, *post*, p. 393. But *quære*, if it be the same?

the testator's death. *Vid. ante*, C. 183.

[ \* 337 ]

The rent is a charge upon the land, and only the surplus profits over and above the rent shall be assets. *Post*, p. 394. *Wentw. Exec.* p. 147, (edit. 1763). 1 Salk. 317.

When executor of lessee for years enters, the lessor may elect to charge him as executor in the *detinet*, or as assignee in the *debet* and *detinet*. *Ante*, C. 183, 282. *Post*, C. 489. 3 East, 3.

1 Saund. 1, n. 1.

the case in Dy. 324, where a covenant to repair is broken by the executor; yet judgment shall be *de bonis testatoris*, for there it doth not appear upon the record, that he hath any assets in his hands; but where that appears, it is otherwise, and that is the reason, that for rent incurred in the executor's own time, he shall be charged in the *Debet* and *detinet*, because it doth there appear, that he hath taken the profits; and so in case of *devastavit*, an action of debt lies against him, because \*it appears, that he hath received the profits to raise assets; and so in this case it is alleged, that he entered and enjoyed it, and so took the profits; so that this is not like the case of a covenant to do a collateral act, as to repair, &c. but here, when he enters and takes the profits, he hath in effect made this his own covenant, being a covenant that goes along with the land to the assignee, and so ought to be charged *de bonis propriis*, and then *plene administravit* is no good plea. And Sir William Jones *pro quer.* said, that this differs much from a collateral covenant; for if an executor do pay damages recovered for breach of a collateral covenant, he cannot plead it against judgments or statutes; but if he pay rent, he may.

*Hale*, Ch. Just.:—The reason of that is because the rent is a charge upon the land, and nothing shall be assets, but what is over and above the rent.

*Saunders pro defendente* confessed, that an action of debt for rent in the *Debet* and *detinet* would lie against an executor for rent incurred in his time; but the reason of that is, because it is grounded barely upon the possession, and must be laid in the same county; whereas an action upon a covenant of the testator may be laid any where, because then he is charged upon the deed of the testator without any respect to the possession; and although it be alleged, that the defendant entered and took the profits, yet the defendant could not traverse that, and the books are clear, that for breach of a covenant judgment shall be *de bonis testatoris*, and then *plene administravit* is a good plea. 2 Cro. 67. Bendloe, 134, 135.

*Hale*, Ch. Just.:—When a lessee for years dies, and his executor enters, it is in the election of the lessor to charge him either as executor in the *Detinet* only, or else as he takes the profits (and is as it were an assignee) in the *Debet* and *detinet*; and if he charges him in the *Detinet* only, judgment shall be *de bonis testatoris*; and here you have brought covenant against him as executor, and you having made your election to charge him so, certainly *plene administravit* will be a good plea (b). Sir William Jones did confess, that if it would not

(b) Acc. *Buckley v. Pirk*, 1 Salk. 316-7. *Lyddal v. Dunlap*, 1 Wils. 4; and see *Wilson v. Wigg*, 10 East, 313. *Collins v. Thoroughgood*, Hob. 188. *Bridgeman v. Lightfoot*, Cro. Jac. 671.

*Clements v. Waller*, 4 Burr. 2154. When the plaintiff elects to sue the executor as assignee, the declaration does not name him executor, but alleges that all the estate, &c. of the lessee came to the de-

amount to a charging of him as assignee, when it was pleaded, that he entered and took the profits, that the plea would be good against them: and it was said in this case, if a man do covenant to pay rent, and after assigns, the lessor may upon this covenant charge the party, or his executors, or the assignee, at his election; and so it is if there be twenty assignments, for the \*party and his executors are always liable upon the deed to the covenant. 2 Cro. 522.

[ \* 338 ]

*Per Hale*,—If the assignee breaks the covenant, he may be charged, or the lessee, or his executors; but if an assignee assign over, and the second assignee break the covenant, the first assignee cannot be charged (c), but the second assignee that broke the covenant, or the lessee, or his executors may.

If an assignee of a term breaks an express covenant, either he, or the lessee, or his executors, may be charged: but if the assignee of an assignee breaks it, the first assignee is not chargeable.

If an executor assign over, he may still be charged for the rent in the *Detinet* if he have assets, but not in the *Debet* and *detinet*, but for the time that he occupies. J. S. lessee for years, rendering rent, assigns and dies, his executor, if he hath assets, may be charged in the *Detinet*, or in covenant.

If an executor of lessee assigns the term, he is still liable as executor for rent, or on a covenant to repair &c (d).

If there be a covenant to repair, or not to assign, the executor is chargeable after assignment, but not *de bonis propriis*. *Adjournatur*.

fendant by assignment. *Tilney v. Norris*, Carth. 519. 1 Saund. 1 a. note (1); and see *Remnant v. Brembridge*, 8 Taunt. 195. *Derisley v. Custance*, 4 Term Rep. 75.

(c) See *Taylor v. Shum*, 1 Bos. & Pull. 21-3. *Onslow v. Corrie*, 2 Madd. Rep. 340.

(d) *Wilson v. Wigg*, 10 East, 313. Post, C. 489.

### MENATE v. COLTLO.

( C. 418. )

*S. C. Manel v. Coltloe*, 3 Kebl. 190.

SCIRE FACIAS was sued by an administrator against the bail, who came and pleaded, that the testator did not sue out any *capias* against the principal (a), and do not say that neither the intestate nor administrator did; for if the administrator did, it is well enough; for after the death of the testator, he may, after a *scire facias* sued out against the principal, sue out a *capias* against him; and *Jones* said this is like the case of an executor, that sues for a debt, he must allege, that it was neither paid to the testator nor to him.

In a *scire facias* by an administrator against bail, a plea that the intestate did not sue out any *ca. sa.* against the principal, is good, without saying that neither the intestate nor the administrator did.

And the Lord Chief Justice said, perhaps this may *prima facie* be good; and if the administrator hath sued out any *capias*, it may come properly on his part to allege it: whereupon another exception was taken, for the writ was *scire facias quare executionem*, and *habere non debet* was left out; but they prayed, that this being a judicial writ might be amended, if it were right upon the file; whereupon a search was ordered (b).

*Scire facias quare executionem*, omitting *habere non debet*, is bad, but may be amended if right on the file.

(a) It seems enough to say that "there was no writ of *ca. sa.* sued out of; &c. against, &c." without adding by whom. See 2 Chitty Pleading, 536, 2d edit. Clift. Ent. 188.

(b) *Barter v. Peach*, 2 Lutw. 1282. As to amending a *scire facias* against bail, see 9 East, 316. 2 Bos. & Pull. 275. 3 Id. 321. 2 New Rep. 103. 1 Taunt. 221.

Bail are discharged by the death of the principal before the return of the *ca. sa.* 2 Wils. 65. 6 TermRep. 284.

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( C. 419. )

In this case it was said, *per Curiam*, that if the principle die before the return of the *capias*, the bail are discharged; but if he die after the return of the *capias*, and before the return of the *scire facias*, they are not discharged, for the *scire facias* is, as it were, but a writ of grace.

AYRE v. RUSHTON.

S. C. 3 Kebl. 190.

Upon a distress for damage-feasant, tender of amends must be made before the impounding. *Acc. post*, p. 527. 2 Lutw. 1596. A tender of amends before action brought, by virtue of the stat. 21 Jac. 1, c. 16, is not pleadable in replevin.

REPLEVIN; the defendant avows for damage-feasant; the plaintiff pleads a tender of amends *post captionem et ante deliberationem*; and the Court resolved that it was naught, for the tender ought to be before the impounding, according to *Pilkington's case*, 5 Co. 76; [8 Co. 147]. And *ante deliberationem* implies, that it was after the impounding, and so comes too late (a). *Twisden* said, perhaps he might mean, that the tender was before the replevin, and so might be good, *per stat.* 21 Jac. 1, c. 16; but, *per Curiam*, that extends only to actions of trespass. *Vide Het.* 165(b).

(a) For the plaintiff's remedy in such a case, see *Anacomb v. Shore*, 1 Camp. 285, 289, note (a). S. C. 1 Taunt. 261. *Sheriff v. James*, 1 Bingham Rep. 341.

(b) S. P. *Twining v. Stephens*, *post*, p. 527. *Allen v. Bayly*, 2 Lutw. 1596. *Newson v. Waters*, Bac. Ab. Tender, (P), pl. 52.

( C. 420. )

HARVY v. OLDFIELD.

S. C. 3 Kebl. 188.

A fence cannot be broken down to distrain for rent.

THE question was, whether a man might break down a fence to distrain for a rent-charge, especially it being alleged, as it is here, that other grounds chargeable were open; *et semble per le Court que nemy*, a particular breach of gate or fence being alleged. 1 Inst. 161 (a).

(a) According to the report of Keble, the Court conceived that "entering *per viam apertam* inclosure may be broke." See further on this point, 1 Rol. Ab.

671. *Anony. Comb.* 17. *Browning v. Dann*, R. T. Hardw. 168. *Viner, Distress*, E. 2, pl. 6. *Gould v. Bradstock*, 4 Taunt. 562. 2 Saund. 284 a. note (2).

( C. 421. )

BROWNE v. HONYWOOD.

S. C. *post*, p. 414.

THE question was, whether *concessi* did imply a warranty in case of freehold. *Et adjournatur* to be argued. *Vide* 5 Co. 18. *Post*, Case 547.

( C. 422. )

ANONYMUS.

A presentment in a leet for a personal misdemeanor, or in a swainmote concerning vert or venison, is a conviction, and conclusive; but

It was said by *Hale*, Chief Justice, that if there be a presentment in a leet for a personal misdemeanor, or in a swainmote concerning vert or venison, if it pass that day, it is a conviction, and conclusive; but if it be for a nuisance, or any matter that concerns freehold, the party may come afterwards and traverse; and he said, that when he sat in the Exchequer, a *Quo Warranto* issued out against the water-



bailiffs (a), for convicting men upon presentments and fining them without more ado; and when the parties brought actions against them for levying the fines, and used to cast them, they would afterwards estreat their fines in \* the Exchequer, and then levy them by process issued out of the Exchequer, and then the parties had no remedies but an action on the case for estreating things not estreatable; but for this cause their patent was repealed upon this *Quo Warranto*; for men ought not to be convicted barely upon a presentment, unless in those cases *supra* (b).

If for a nuisance, or concerning the freehold, it is traversable.

[ \* 340 ]

*Per Hale, C. J.*

*Semb.* Case lies for estreating things not estreatable.

(a) *S. C.* 2 Hale P. C. 155.

(b) *S. P.* in 2 Hale's M. P. C. p. 155, and 2 Hawk. P. C. 71. Com. Dig. Leet. G. 2. Scroggs on Courts, p. 85, 4th edit. Yet it seems that although no traverse whatever can be tried by the leet, the presentment is traversable upon removal into the King's Bench by *certiorari*, or it may be disputed in an action. *Matthews v. Carey*, Carth. 73. 6 Vinor Ab. 597. pl. 4. *R. v. Roupell*, Cowp. 458. After the fine has been

estreated and paid, no *certiorari* will be granted. *R. v. Ritson* (or *Heaton*), 2 Term Rep. 184. See further on traversing presentments by the leet, Finch's Law, 386. Kitch. p. 84, 2d edit. Dyer, 13 b, pl. 64, and particularly Lambard's *Eirenarcha*, p. 542-3, ed. 1619, and Callis on Sewers, p. 213-7. The leet jury is said to be in the nature of a grand jury, *per Abbott, C. J.* in *R. v. Joliffe*, 2 Barn. & Cress. p. 58.

MUN v. BAYLIES:—*Trin.* 23. *Car.* 2. *Rot.* 1012.

( C. 423. )

*S. C.* 1 Vent. 244. 2 Lev. 61. 3 Keb. 46, 107, 193.

ONE Cooper was vicar of Cranbridge, a market-town in Kent, and made a lease of the houses in question for three years, and afterwards, after the expiration of one of those three years, he made another lease about the seventeenth of September, to begin at Michaelmas following, which lease was confirmed by the patron and ordinary (under which lease the defendant claims) and then he dies, and one Buck was his successor, who made a lease of the same houses to the plaintiff.

Death is not such a non residence as will avoid a lease by a parson.

A reservation of rent in a parson's lease, payable on the quarter days, or within 20 days after, is good, and binds the successor; and the tenant shall not have 20 days after the last quarter day of the term.

A concurrent lease by a parson to commence at a future day, is a lease in reversion, and void against the successor.

The rent reserved by Cooper upon the lease for twenty-one years, was payable quarterly during the term, or within twenty days after every quarter-day.

This case was argued by all the Judges of the King's Bench, and they all agreed that judgment should be for the plaintiff.

There are three points made in the case.

1. Whether the death of Cooper should be said a non-residence within the statute of 13 Eliz. 20, to avoid his lease.

And they all agreed, that it should not. For the statute of 13 Eliz. 20 was made for a farther punishment of non-residence; for the statute of 21 H. 8 gave only 10*l.* a-month for non-residence; this adds as a farther punishment, 1. That all leases shall be void. 2. That they shall forfeit a year's value to the poor of the parish. The statute takes it to be such a non-residence as is a crime, for it says the party so offending, and death cannot be properly said [to be] an offence:

1 Inst. 45 a.

besides, it would be to no purpose to have the lease confirmed by the patron and ordinary, if it must determine by his death; for if a parson make a lease for 100 years, it will be good against him during his life though it be never confirmed.

[ \* 341 ]

The reason why the statute of 13 Eliz. 20 makes leases void for non-residence, is, because that persons that take leases of them, should tie them up by covenants to be resident, lest their leases should be avoided; as they used \* to do at the common law, when they took leases, the lessees would take security that they should not resign.

At the common law, if a person [*parson*] had made a lease for 1000 years, it had been good during his life, and so it is still; but at the common law, if it had been confirmed by the patron, it had been good during the term; but now by the statute of 13 Eliz. though it be confirmed, yet it is not good if it be for above twenty-one years, or three lives.

The alteration that hath been made by statute hath been in this nature, upon the whole chain of statutes, as *Hale* called it:

1 Inst. 44.

1. The statute of 32 H. 8, 28; and this enables persons seised in right of their church to make leases for twenty-one years or three lives; but a parson and vicar are here excepted to let in other manner than they might have done before 1 Eliz. It must be confirmed by the patron and ordinary.

The statute of 13 Eliz. 10 disables them to make leases for above twenty-one years or three lives, (although it be confirmed by the patron and ordinary).

Statute of 13 Eliz. 20 makes their leases void by non-residence for eighty days.

Statute of 14 Eliz. 11 enacts, that the statute of 13 Eliz. 10 shall not extend to houses in market-towns, provided they do not make leases in reversion, nor for above forty years.

Statute of 18 Eliz. 11 enacts, that no lease shall be made of lands, whereof a former lease is in being and unexpired, more than three years.

1 Vent. 245.

And as for the resolution in the case of *Mott* and *Hales*, Cro. Eliz. 123, they said it was against law and reason; and, in Moor, 270, it doth appear the Court was divided.

*Per Twisden*:—If death be construed a non-residence to avoid the parson's lease, it would be to no purpose to have it confirmed.

6 Co. 21.

What non-residence will avoid a parson's lease. Wats. Clerg. L., Ch. 37.

And it appears clearly in *Butler's* and *Goodall's* case, that it must be a voluntary non-residence that is intended by the statute; for there it is agreed, that lawful imprisonment without covin is a lawful excuse; *quia impotentia excusat legem*, and there is no impotency so great as death.

And *Hale*, C. J. took this ground, that non-residence, which doth not subject a man to a punishment, shall not

avoid a lease: and death cannot be said to be such a non-residence as a man shall be punished for (a).

\* The second point was, whether the reservation of the rent [ \* 342 ] to be paid every quarter-day, or within twenty days after, be good or not?

And the whole Court agreed this to be a good reservation. And whereas it hath been objected, that the rent will be lost for the last quarter, because it will not be due till twenty days after the expiration of the term; and so the party cannot distrain (b): It was answered by *Rainsford*, that the twenty days at the end of the term should be void, and the rent should be due the last quarter-day, though before that the party hath election to pay it either at the quarter-day, or twenty days after. And *Hale* said, here would be no disadvantage to the successor, but here might be an advantage; for if the parson that made the lease died the next day after Michaelmas, &c., the successor would have the rent. . . .

2 Cro. 228.  
Yelv. 167.

If rent in a parson's lease is payable at Mich. or within twenty days after, and the parson dies on the day after Mich., the successor shall have it. *Per Hale, C.J.*

The third point was, whether or no this was a lease in reversion or not; for, if it were, then it is excepted out of the statute of 14 Eliz. and so is void; for by the statute of 13 Eliz. cap. 10, it is enacted, that all leases made by parsons, &c. for above twenty-one years, or three lives, from the time of the making of any such lease, shall be void; and although the statute of 14 Eliz. gives power to make leases of houses in market-towns for forty years, yet leases in reversion are excepted out of that statute; and this lease being made the 17th of September, to begin at Michaelmas following, is a lease in reversion. And *per Twisden, Rainsford, and Wylde*, there are two sorts of leases in reversion.

1. A concurrent lease, a former lease being in being; and so it could not be a lease in possession, because the possession was in the former lessee. Cro. Eliz. 564 (c).

2. A lease to commence *in futuro*; and they said, both these are leases in reversion; for there are but leases in possession, and leases in reversion; and neither of these

A lease in reversion is either a concurrent lease, or a lease to begin *in futuro*. *Vid. Winter v. Loveden*, 1 Ld. Ray. 269. S. C. 2 Salk. 537.

(a) On avoidance of leases by non-residence, see *Doe v. Mears*, Cowp. 129. *Doe v. Barber*, 2 Term Rep. 749. *Graham v. Peat*, 1 East, 244. *Frogmorton v. Scott*, 2 East, 467. *Atkinson v. Folkes*, 1 Anstr. 67; and the late statutes 43 Geo. 3, c. 84. 57 Geo. 3, c. 99.

(b) Yet it seems that even after deducting the indulgence of twenty days from the end of the term, the rent due on the last day was not distrainable at common law. Co. Lit. 47 b. *Vid.* 8 Ann. c. 14.

(c) "The stat. 14 Eliz. c. 11, § 19, "which restrains the clergy from making "leases in reversion is to be understood of "leases *in futuro*. So was the case of "*Baily v. Muns*, in the time of Ld. "C. J. Hale." *per Holt, C. J.* in *Win-*

*ter v. Loveden*, 1 Ld. Ray. 269. But according to the above report the majority of the Judges were of a different opinion, and seem to have thought that a concurrent lease was equally restrained. See, further, the case of *Lyn v. Wyn*, reported (under another name) in Carter; p. 9, and very fully argued by Bridgman, C. J. in the report of his Judgments edited by Mr. Bannister, p. 122, and Appendix, *ibid.* p. 592. Bac. Abr. Leases, (E), Rule 3. *Tomson v. Trafford*, Popham, 8. S. C. 2 Leon. 188. *Shaw v. Summers*, 3 B. Moore, p. 196. Some of the acts of Eliz. mentioned in the principal case are partially repealed, as to leases of livings and benefices, by 57 Geo. 3, c. 99.

*Doe v. Calvert*,  
2 East, 383.  
*Ante*, p. 184.

The stat. 18  
Eliz. c. 11, does  
not extend to  
stat. 14 Eliz. c.  
11, concerning  
houses in market  
towns. *Per* 3 J.

[ \*343 ]  
against *Hale*,  
C. J. Hob. 269.  
1 Ventr. 246.

*Vid.* Hale MSS.  
in Harg. Co. Lit.  
45 a. n. 2.

(1) Note: That  
case is of cove-  
nants, and not  
leases. [Note  
by reporter.]

being leases in possession, they must be leases in reversion.

If a man have a power to make a lease, he cannot make a lease to commence *in futuro* (d). 6 Co. 88. 2 Cro. 319.

And these three Judges said, that the statute of 18 Eliz. doth not extend to leases within the statute of 14 Eliz.; for there the statute of 13 Eliz. is recited, and it relates particularly to that, and doth not extend to the statutes of 1 Eliz. concerning bishop's leases, nor 14 Eliz. concerning houses in market-towns.

\* But *Hale*, Chief Justice, though he agreed with them in the main, that judgment ought to be given for the plaintiff, because this lease (made to begin at Michaelmas following) was a lease in reversion, and so void, yet he held, that if it had been to commence presently, it had been good, and had been no lease in reversion, though there were but one year of the other lease for three years expired; but he said, if there had been no lease in being, if a lease be made to commence *in futuro*, it is a lease in reversion; or if there had been above three years in being of the former lease, and this lease had been made to commence from the making, yet it had been void by the statute of 18 Eliz. 11; for he said, that statute should extend to leases made by 14 Eliz., notwithstanding the case of *Crane* and *Taylor*, Hob. 269(1). And although that clause in 18 of bonds and covenants extends and is limited only to the statute of 13, yet the clause concerning leases is general, and goes to both the statute of 13 and 14; and the case in Hob. 269 is of covenants only; for although the statute of 18 mentions only the statute of 13, yet he said this statute of 14 is as it were mortised into the statute of 13; and they are so linked together, that they have been always used to be expounded by one another; as the statute of 1 Eliz. and 13 Eliz. are expounded by the statute of 32 H. 8, 28, and yet they take no notice of it; there is not any word in either of those statutes, that the leases must be made by indenture, &c.; yet all the qualifications appointed by the statute of 32 H. 8, are to be observed.

But they all agreed, that judgment ought to be given for the plaintiff, because it was a lease in reversion.

And *Hale* said, the reason why this statute of 18 doth not extend to bishops, is, because it begins with deans and colleges, &c., and so shall not extend *ad majora*. 2 Co. 46.

(d) *Shaw v. Summers*, 3 B. Moo. 196.

( C. 424. )

ANONYMUS.

*Semb.* S. C. *Curtis v. Bourne*, 3 Keb. 133, 175, 197. 2 Mod. 61.

Baron and feme,  
seised to them  
and the heirs of  
the baron, make  
a lease, and then

BARON and feme, seised to them and the heirs of the baron, make a lease; the lessee commits waste; they bring an action of waste, and conclude *ad exheredationem eorum*; and the judgment also was entered, that they should recover the

damages; whereas the damages ought to go to him only that had the inheritance; *et semble q' male* (a).

(a) See Fitz. Ab. Waste, pl. 4. 4 Viner, 183.

join in an action of waste. *Semb.* a count concluding *ad exheredationem eorum* is bad.

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### HEATH v. MANUCAPTORS of HALL.

S. C. 3 Keb. 199.

It was said, that although part of a debt be levied upon the principal, yet the bail are liable for the residue.

Where part is levied on the principal, the bail are liable for the residue.

( C. 425. )

### DAVYS v. LINING.

S. C. 2 Lev. 89. 3 Keb. 139, 200. and *vid. ib.* 29, 34, 41.

TRESPASS for taking 12 dozen of stockings in the town of Bridgwater, wick was a market-town, the plaintiff being an inhabitant of Taunton, which was another market-town. The question was upon the statute of 1 & 2 Ph. & Mar. 7, whether, notwithstanding that statute, the inhabitants of one market-town might sell goods in another? And *per Curiam*, the statute extends only to the prohibiting of those that live in the country out of market-towns, &c. and so the plaintiff living in Taunton, which was another market-town, might lawfully sell, and therefore not within the act. *Jud' pro quer'.*

The inhabitants of one market-town are not prohibited by 1 & 2 Phil. & Mary, c. 7, from selling in another market-town. *Acc. Lee v. White*, Dougl. 256.

( C. 426. )

### TUTTHILL v. ROBERTS.

S. C. 3 Keb. 201.

THE plaintiff intituled himself by a bargain and sale in consideration of certain articles of agreement, and doth not say for money; and for that cause judgment was reversed. *Vide* Style, 188, 205.

In consideration that such a one was bound for him for money owing, he did bargain and sell; no good consideration. But *per Hale*, C. J. If there be a covenant in consideration of money to convey, and a bargain and sale pursuant to that covenant, that will be a good consideration (a).

It was said in this case, that a man may distrain for part of his rent, and need not speak of the residue; and it is not like an action of debt, for that must be intire (b).

A bargain and sale of lands, in consideration of articles of agreement, will not raise an use: *secus*, if it be in pursuance of a covenant to convey in consideration of money.

A man may distrain for parcel of his rent. 3 Keb. 201.

( C. 427. )

(a) See the authorities in Com. Dig. Bargain and Sale, B. 11. *Barker v. Keste*, ante, p. 249. The consideration must be *valuable*; it may be either money or money's worth. 2 Preston Convey. p. 373, 2d edit.

(b) See the cases referred to in note (b) ante, p. 38. If the defendant avows for part of a quarter's or half year's rent, he must shew the rest satisfied. *Bulles Ni. Pri.* 58. 12 Mod. 84. 4 Mod. 402.

## DE TERM. S. MICHAELIS, 1673.

IN BANCO REGIS.

( C. 428. )

RANDALL v. RIDDLE.

Continued from p. 105-6.

See margin, p.  
105, S. C.  
Vid. *Brooke v.*  
*Thomlinson,*  
*ante*, p. 47-8.

THIS term judgment was given in this case. It was argued for the plaintiff by Serjeant *Hard*:—That the custom of gavelkind cannot extend to a rent charge newly created: Because, 1. This is a new thing, and so it wants time to prescribe or to allege a custom.

2. Such customs extend not to collateral qualities. *Perk.* 84. *Fitz. Dower*, 85. 1 *Inst.* 12 b. 1 *Co.* 100 b. 5 *Ed.* 4, 7.

3. A rent charge created *de novo* differs from rent service and from land, for it may cease and revive again. 1 *Co.* 84. And a rent is a thing severed from land. 14 *H.* 8, 8.

4. The heir at common law shall not be disinherited by a construction. 1 *Inst.* 13. *Litt. sect.* 31.

Authorities cited were 26 *H.* 8, 4 b. 22 *Ed.* 4, 15. 14 *H.* 8, 7 and 8. 21 *H.* 6, 11. *Noy*, 15.

For the defendant it was said, that rent shall follow the nature of the land; and therefore the land being gavelkind, the rent shall be so too. 1 *Inst.* 111, 132. *Perk.* 22.

And though it be a rent created *de novo*, yet that alters not the case; for intails were created in time of memory, yet intailed lands shall descend to all the sons; and so it is of uses, *Shelley's case*. Authorities, 4 *Ed.* 3, 120. 14 *H.* 8, 5.

[ \* 346 ] \* *Stokes* and *Barnard's case* in Chancery, where suit was for writings, by the opinion of *Bridgman*, Lord Keeper. 22 *Ed.* 4, 10. *Lamb.* 547. *And.* 191.

Besides, the nature of gavelkind lands is not a bare custom, but in Kent it is common right. 2 *Ed.* 4, 18. 1 *Inst.* 140.

*Hale*, C. J. was of opinion for the defendant, that the rent should follow the nature of the land: and he said the case is much the stronger, because it is not barely by custom that lands descend by gavelkind, but is common law in Kent (1); and upon evidence if it appear that the lands lie in Kent, *prima facie* they are partible, and it puts the proof on the other side; but in pleading it must be alleged that they are gavelkind, and *partita* and *partibilia*: But if gavelkind land lie in another place, a custom must be alleged; as that they are *partita et partibilia*, and so have been *a tempore in cujus contrarium hominum, &c.*

And though this be a rent newly created, yet that alters not the case; for all uses are new, both in respect of their creation and existence; for there was a time when uses were not known in England, and yet they shall follow the nature of the land.

An use of gavelkind land shall follow the nature of the land.  
*Ante*, p. 105.  
S. C.

And he said, a rent is part of the profits of the land, and



so is guided by the same customs; and the case of Noy, 15, was of an intire rent issuing out of gavelkind and other lands, and there the common law shall have preference. 1 And. 191. And Fitz. Dower, 85, rightly understood, is express in the point; for there *Mortdancestor* was brought of a rent issuing out of lands devisable; and resolved that it would not lie, for the rent follows the nature of the land; and it would not lie of lands devisable, for the writ is to inquire, whether he were *seisitus die quo obiit*, and if the land be devisable he may be so seised, and yet devise them away; and he gave his opinion for the avowants, and *Wylde* and *Rainsford concordaverunt* (a).

Cro. Eliz. 607.  
4 Inst. 221. 1  
Rol. 533, 609.  
1 Rol. Rep. 328.  
Assise of *Mortdancestor* lies not of devisable lands, nor of rents issuing thereout. 3 Bl. Comm. 187.  
Booth, R. A. 208.

(a) See Bro. Rent. pl. 13. 14 Viner Ab. p. 14, 15. Hargr. Co. Lit. 175 b, n. (4). *Ib.* 111 a. n. (5). *Stokes v. Verryer*, 3 Keb. 292. 1 Mod. 112. pl. 7. *Clements v. Scudamore*, 2 Ld. Ray. 1028. *Doe v. Bishop of Landaff*, 2 New Rep. 491.

It was ruled in the King's Bench, that if a man promise to pay money at any time within a month upon request, that the creditor may request after the month, and the debtor shall have a month's time after the request to pay the money.

( C. 429. )

On a promise to pay at any time within a month on request, the creditor may request after the month.

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( C. 430. )

SUPERSEDEAS may be had upon a second and third writ of error, &c. if they be abated by the not coming of the justices, without default of the party: *per Wylde*. Latch, 57. *Post*, Case 437. [p. 350.]

A second writ of error is a *supersedeas*, if the first abates without default of the party (a).

(a) Cro. Jac. 135. 8 East, 412.

# HOLCROFT v. DICKENSON.

S. C. ante, p. 95.

( C. 431. )

ASSUMPSIT. In consideration the plaintiff had promised to marry the defendant, the defendant did promise to marry the plaintiff within a fortnight; and she avers, that she was *semper parata et obtulit se*, and doth not say "within a fortnight." *Per Curiam*: It is well enough, without saying *obtulit se* at all, because she was *semper parata*. *Per Wylde*: The man is *ducere uxorem*. [Style, 295, 303. 1 Rol. 470.]

In *assumpsit* by a woman for breach of a promise of marriage, it is enough to aver that she was *semper parata*, without saying *obtulit se* (a).

(a) Ante, p. 65, 97, 168. 1 Keb. 866. 2 Keb. 265, 283.

# KING v. ROSE.

S. C. T. Raym. 228. 3 Keb. 228, 250. *Post*, p. 356.

( C. 432. )

TRESPASS for breaking down his fences and eating up his grass with his hogs, and killing two mastiffs, *continuando* from the 21st of June to the 20th of July.

Defendant may justify killing the plaintiff's mastiffs to prevent them from killing the de-

The defendant pleads, as to the trespass of his hogs, that the fences were out of repair, and as to the killing of the

defendant's hogs, although the hogs were trespassing.

A plea excusing a trespass by cattle from the defect of fences must shew the fences to be the plaintiff's, and the closes to be contiguous.

A plea bad for part is bad for the whole.

1 Saund. 27,

[ \* 348 ]

and notes, *ibid.*

3 Keb. 228.

Com. Dig. Plead. E. 36.

mastiffs, that they were set upon his hogs, and were like to kill them, and to prevent that he entered and killed the mastiffs.

The plaintiff demurs, and shews, that the defendant says the fences were out of repair, but doth not say that they are the plaintiff's fences, nor that the plaintiff's close was *contiguè adjacens*.

*Hale*: The justification of killing the mastiffs is well enough; for a man may not set mastiffs upon pigs to kill them, but he may hunt them with a little dog. 4 Co. 38. Latch, 13. Jones, 131 (a). [Cro. Car. 254. 2 Cro. 45.]

But not alleging that it was the plaintiff's mound, (as to the other part) *semble q' nest bone* (b), and then the plaintiff shall have judgment; as an action was brought for a battery, and taking away the plaintiff's horse; the defendant pleaded *non culp' infra 4 annos*, which was good for the battery, but not for the rest, and so the plaintiff had judgment.

\* But then for the defendant an exception was taken to the declaration, because it is laid for breaking his fences, with a *continuando*, which cannot be; and for that were cited 2 Ri. 3, 15 b. 20 H. 7, 3. Rol. 545. And of that *Curia advisare*, &c. [*Vid. post*, p. 356.]

(a) 2 Rol. Ab. 566-7. *Barrington v. Turner*, 3 Lev. 28. *Wright v. Ramscot*, 1 Saund. 84, and notes *ibid.* *Keck v. Halstead*, 2 Lutw. 1494. Com. Dig. Pleader, 3 M. 33. *Janson v. Brown*, 1 Campb. 41. *Vere v. Lord Cawdor*, 11

East, 568. *Deane v. Clayton*, 2 Marsh, 577. S. C. 7 Taunt. 489.

(b) See, further, on the requisites of this plea. Com. Dig. Pleader, 3 M. 29, and F. N. B. in the notes to p. 298, quarto edit.

( C. 433. )

### KEENE'S CASE.

S. C. R. v. King, 3 Keb. 197, 230.

Residence within the jurisdiction of the leet of an ancient borough, will not exempt a man from the office of constable of the hundred (a).

2 Hawk. P. C. c. 11, § 3.

INFORMATION against Keene, for refusing to take the oath of a constable of the hundred, being chosen in the leet.

The defendant pleads, that Wincatton is an antient borough, and that they have a leet there, and used to choose their own officers, &c. within the borough.

The question was, whether the living within the jurisdiction of an inferior leet should exempt a man from being chosen high constable in the leet of the hundred?

And it was argued for the informer that it should not, for that high constables were ordained by the statute of 13 Ed. 1, and this privilege shall not hold against an act of parliament; and the inferior leet hath its effects in two things, 1. In giving ease to the residents to be sworn there, and in chusing their own officers, and they shall not be distrained to come to the superior leet. Nat. Brev. 94, 9. 10 H. 4, 4. 2 Cro. 583.

For the defendant it was said, the hundred leet should not meddle within the private leet, unless it were where the private leet omitted to do their duty, and then they might. 2 Cro. 551. Bro. Leet, 13. 18 H. 6, 12. unless it were by par-

(a) Acc. *Queen v. Jennings*, 11 Mod. 215, 227. *R. v. George*, Cowper's Rep. 13.

ticular custom; and it was said, that all leets are originally derived out of the sheriff's torn, but the sheriff used to keep it in every hundred. Nat. Brev. 160. 2 Inst. 122. And it was said, that high constables were not created by the statute of 13 Ed. 1, but they were by the common law, as appears by Lamb. Office of Constables, 16.

*Hale, C. J.*—The case will be very different if this be really a borough, and if it be an upland town; for formerly in England every hundred used to send their jury, and every borough used to send four men of their own; and constables were before the statute (b), but that gives them view of armour: and he said, that the superior leet shall not meddle in the inferior of matters inquirable there, unless it be in case of omission; but he said, a constable of an hundred was an article that the inferior court could not meddle in, because it is an office that extends beyond their jurisdiction (d); and so judgment was against the defendant *nisi*.

When an inferior leet omits to do its duty, the leet of the [ \* 349 ] hundred has jurisdiction (c).

It was moved against the information, that it is said, *Curia Letæ Hundred*, whereas it should have been *Cur' visus Franci Plegii*; but, *per Curiam*, that is well enough. 11 Mod. 228.

And *Hale* said, when a hundred leet is granted to a subject, it is a franchise.

Hundred Leet granted to a subject is a franchise (e).

(b) *Cent.* as to high constable, 4 Inst. 267. 2 Show. 76. 2 Hale, H. P. C. 96. But see *accord* 11 Mod. 315. 1 Salk. 175, 381. 2 Ld. Raym. 1193. Bac. Ab. Constable, (A).

(c) *Id.* Cro. Jac. 551. 4 Inst. 261. 2 Hawk. P. C. c. 10, § 64. c. 11, § 4. (d) *R. v. Genge*, Cowp. 17. (e) 1 Vent. 405. 4 Mod. 343.

### THE KING v. LIVER.

S. C. 3 Keb. 231.

( C. 434. )

A WRIT of error was brought upon an indictment of battery, and it was assigned for error, that the judgment was given by the justices of gaol-delivery; and it doth not appear that the party was in gaol, and then they have no power, for they cannot try one at large; but it was made a question, whether or no the statute of 4 Ed. 3, ch. 2, that gives the justices of gaol-delivery power to proceed upon indictments taken before justices of the peace, hath not given them (by implication) power to grant out process, and proceed against the parties, though they be at large; for otherwise such parties cannot be tried neither by justices of gaol-delivery, nor of Oyer and Terminer, for these latter cannot proceed against them, but on indictments taken before themselves. Resolved, that *priso*, or *prisonarius*, a prisoner, is well enough.

On the jurisdiction of the justices of gaol delivery, where the party is at large. 2 Hale H. P. C. c. 4, 5. 2 Hawk. c. 5, 6.

4 Inst. 168.

### PYM v. BENSON.—*Mich.* 1673. *Rot.* 1022.

S. C. *Pris v. Beal*, 3 Keb. 231.

( C. 435. )

If a man pay money due to a bankrupt before notice, he shall not be charged for it again; but if he have notice, and it be recovered from him by law, he shall not be charged

Payment to a bankrupt before commission issued is good, if

made without notice of the bankruptcy, or by compulsion of law.

neither; for perhaps nobody will take any commission out against him (a).

(a) *Vid.* Stat. 1 Jac. 1, ch. 15. 46 2 Term Rep. 113. *Foster v. Allanson*, Geo. 3, c. 135. 56 Geo. 3, c. 137. *Grove* *ibid.* 479. *Brooks v. Sowerby*, 8 Taunt. v. *Smith*, 3 Keb. 190. *Vernon v. Hankey*, 783. S. C. 4 Barn. & Ald. 523.

( C. 436. )

WISEMAN v. NORTH.—*Trin.* 1673. *Rot.* 357.

S. C. 2 Lev. 92. 1 Ventr. 249. 3 Keb. 219, 232.

The defendant in replevin may plead property in himself, and such a plea will

THE defendant avows, for that the property was in him, and not in the plaintiff.

The plaintiff demurs, because this amounts to the general issue, *Non cepit*.

[ \* 350 ]

entitle him to a return. Property in a stranger, is pleadable in abatement only.

\* But, *per Curiam*, it is a good plea, and amounts to an avowry, because the party ought to have a return; but to plead that the property is in a stranger is good in abatement, but not in bar. Bro. Replev. 1. 39 H. 6, 35. But in trespass it is no plea at all. 27 H. 8, 21 (a).

*Et Hale agree le difference* in Bro. Avowry, 53, between rent and homage, because although the estate be determined, in one case, the party may have the thing he distrains for, but not in the other (b). *Jud. pro def. nisi*.

(a) According to *Presgrave v. Sanders*, 2 Ld. Ray. 984. 1 Salk. 5, the plea of property, whether in the defendant or a stranger, is a *plea in bar* only.

But see *Butcher v. Porter*, 1 Salk. 94. S. C. Carth. 243. Bull. Nī. Pri. 54.

(b) See the report of S. C. 1 Ventr. 250.

( C. 437. )

SILLEY v. SILLEY.

S. C. 3 Kebl. 232, 315.

Upon error in parliament, the parliament was prorogued from the 3d Nov. to the 7th January following, and the party purchased a new writ, returnable at the next session: held that he was entitled to a *supersedeas* (a).

A WRIT of error was brought in parliament to reverse a judgment given in the King's Bench, and the parliament was prorogued; and the party purchases a new writ of error, returnable *ad proximam sessionem parliamenti*; the question was, whether the party should have a *Supersedeas* upon this writ of error?

And Sir. *F. Winnington*, who moved for the execution, cited the *Lady Wortley v. Hord* (b), Pasch. 21 Car. 2, where a *supersedeas* had been denied in the like case. It was made a question, if a writ of error be brought returnable *ad proximam sessionem parliamenti*, and a *supersedeas* granted, and then the parliament meet and are prorogued, but no acts passed, whether the writ do abate, for no acts passing it can be no session: But here the first writ was returnable on such a day *ad proximam sessionem*, and so the return was passed.

*Hale* said, a prorogation was, when it was done by the king's proclamation, where they do not meet at the day; but

(a) See *Goston v. Sedgwick*, 2 Lev. 93. 1 Mod. 106. *Ld. Eure v. Truron*, Id. 120. *Anon.* 1 Ventr. 266. *Birch v. Triste*, 8 East, 412-3. Com. Dig. Plead-

er, 3 B. 12.

(b) S. C. 1 Ventr. 31. 1 Sid. 413. 2 Keb. 438, 491, 509.

if they meet, it is an adjournment, though it hath the effect of a prorogation (c).

Though an adjournment be for six months, yet the parliament is as it were sitting, and formerly committees have used to sit in such adjournments. [Continued, *post*, p. 360.]

(c) See 1 Blac. Com. 186-7.

BUCKNALL and TOMPSON.

INDEBITATUS *assumpsit pro diversis rebus; semble* (*per Twisden*) *q' nest bone, q' poet estre per obligation.*

( C. 438. )

*Indebitatus assumpsit pro diversis rebus*, bad. *Ante*, p. 104. *Post*, p. 357.

[ 351 ]

AYLWORTH v. FENN.

COVENANT against baron and feme as administratrix of Sir Geo. Smith, and the husband alone pleads; it is a discontinuance (a).

( C. 439. )

In a suit against baron and feme as administratrix, they must both plead.

(a) *Vid.* Het. 10. Yelv. 210. Com. Dig. Pleader, 2 A. 3.

WAYNE v. SANDS.

( C. 440. )

*S. C. Warn v. Sandown*, 3 Keb. 238.

DEBT upon an obligation. The defendant pleads, that one Robinson was bound with him, and that he entered into it by duress. The plaintiff demurs.

In what cases the defendant may plead *duress* to a co-obligor.

*Et semble per Curiam q' n'est plea*, for a man shall not avoid his own bond by a duress to another, though he be but a security.

But *per Wylde*, if the duress be to a father or brother, and a son enters into bond, this is a duress to the son, and he may plead it.

But, *per Twisden*, a man shall in no case avoid his deed by a duress to another, let him be related how he will. 2Cro. 187 (a).

(a) See 1 Rol. Ab. 687. 2 Brownl. Ray. 357. See also *S. P.* in Dig. Lib. 276. Bacon's Maxims, Reg. 18. Finch's 4, tit. 2, l. 8. 1 Domat. (by Strahan,) p. Law, p. 102. *Pullein v. Benson*, 1 Ld. 254, 1st edit.

OXENDAM v. HOBODY.

( C. 441. )

*S. C.* 3 Keb. 239.

DEBT upon an obligation of 20*l.* against an executor, who pleads *plene administravit*, and assets being found of 10*l.* the plaintiff had judgment *quod recuperet* 10*l.* whereas it ought to have been a judgment for the whole, and execution only for 10*l.* (unless it were returned, that he had wasted) and then he might have had a *scire facias* when more assets

Of judgment and execution against an executor, upon a plea of *plene admin.*, when assets are found sufficient to pay

but part of the  
debt.

came to the defendant's hands; and it was held to be erroneous (a).

(a) See the note of Serjeant Williams and *Harrison v. Beccles*, 3 Term Rep. to 1 Saund. 336. *Hancocke v. Prowd*, p. 688.

( C. 442. )

PYBUS v. MITFORD.

S. C. 1 Vent. 372. 2 Lev. 75. T. Ray. 228. 1 Mod. 121, 159. 3 Keb. 129, 239, 316, 338.

See margin, p.  
369.

MICHAEL, seised in fee of Black-acre and White-acre, hath issue John by the first venter, and Ralph by a second venter; and, being so seised, he covenants to stand seised of Black-acre to the use of himself for life, the remainder to John his son by the first venter, and the heirs of his body, &c.

[ \* 352 ] And for White-acre, he covenants to stand seised of that to the use of the heirs male of his body by the second venter.

The question was only of White-acre, whether or no the covenantor had, by virtue of this limitation, an estate for life by implication, and consequently an estate-tail executed in himself?

Three questions were made in the case.

No action lies  
on a covenant to  
stand seised.

1. Whether or no a future contingent use might be raised by way of covenant? and that was agreed upon both sides, that it may; though no action of covenant will lie upon a covenant to stand seised. Plow. 300, 301, 308. Hob. 130, *Oats v. Frith*, although a man cannot charge his heir without charging himself, yet, by way of covenant, a use may arise out of the estate of the heir, where the ancestor's estate was not charged with it during his life.

Yelv. 9. Dyer,  
309.

2d. Question. Whether or no, by operation of law, a use doth arise to the covenantor for life, so as to make him seised of a fee-tail executed? and it was argued by *Winnington*, that he should not, and he laid it for a rule, that in limitation of uses they shall be guided by the intent of the parties, provided it be consistent with the rules of law; and here it doth not appear that it was the intent of the covenantor, but that he would be seised of his old estate till the contingency happen; and where it is said in the *Lord Pagett's* case, that in that case the covenantor should take an estate for life, as it was reported in Moor, some of the Judges were of another opinion; and besides, where he limits the use of Black-acre, in the same conveyance he expressly limits a use to himself for life; and if he had intended to have had one there, he would do so here.

But he agreed, if so be the ancestor had here an estate for life, then *heirs* shall be a word of limitation, and not of purchase; for so it is in all cases where the ancestor takes an estate for life. 1 Inst. 319 b.

Post, p. 371.

3rd. Question. Whether, if no estate arise to the ancestor



for life, if Ralph shall take as a purchaser? And it was agreed by *Winnington* and both sides, that he shall not; for where a man takes as purchaser by the word *heir*, he must be a real heir; and there is a difference in case of descent and purchase. Hob. 31. 1 Inst. 24 b.; and here Ralph is not heir, for John the son by the first venter is living.

*Saunders, pro def.* agreed, that Ralph cannot take as a purchaser for the reason *supra*.

\* But he said, although it should be admitted, that this [ \* 353 ] should rise as an executory use, and the covenantor in the mean time should be seised in fee, yet he said the heir should be in *quasi* by descent, for in many cases where the estate was never in the ancestor, the heir shall be in *quasi per descent*. 2 Roll. 794. 1 Co. 99.

*Obj.* The heir shall not take by descent, but where it might by possibility have vested in the ancestor.

*Ans.* That is not true in many cases; for if a use be limited to J. S. and his heirs, if such an act be done; after the death of J. S., his heir shall be in by descent. If a use be limited to A. and the heirs of the body of his first wife, and if he shall die, having issue by his second wife, then to the heirs of the body of his second wife, the heir shall be in by descent. And he held, that, immediately upon the sealing of the deed, the covenantor was seised of an estate-tail; for, having an estate for life, and the remainder limited to the heirs of his body, executes an estate-tail in himself. And he said an estate for life must needs rise to the covenantor; for when a man is seised in fee, and covenants to stand seised, so much of the estate as he parts not withal is in himself; so here when he limits an estate to the heirs of his body, &c. it is apparent his intent was to reserve an estate in himself for his life, because he could not have heirs during his life. 1 Leon. 256, there is a stronger case where a use is raised by implication to a stranger for life, because a remainder was limited after his death. 2 Roll. 794. 1 Co. 99.

Moor, 718, the *Earl of Bedford's* case, the ancestor took an estate by implication. And *Pagett's* case, 1 Co. 154, is in the very point; for the reason why in that case the Lord Pagett was said to have an estate for life, was, because he had limited an estate to begin immediately after his death, and so it is in this case; for the remainder being limited to his heirs, &c. this must take immediately after his death; and having made no disposal of it for his life, he takes to himself.

If a man covenants to stand seised to the use of A. when he shall marry his daughter, in the mean time the covenantor is seised of his old fee till the contingency happen; but when he limits the use immediately after his death, there by construction of law he takes an estate for life.

*Hale, C. J.* said, that *Pagett's* case was adjudged upon the reason *supra*.

*Ante*, p. 225.  
*Post*, p. 372.

\* And *Greswold's* case, Dy. 156, if it had been by way of use, the estate tail had been good; but that was by conveyance at common law; and in this case the will of the party is to be observed, it being in the case of an estate tail, and of a use.

And he said, if this turn to an estate for life, the covenantor will without question have an estate tail.

2 Rol. 793.

If the remainder had been to the heirs of a stranger, the covenantor should have had the old estate in him till the contingency happened; but being to his own heirs it is otherwise; for the heir and ancestor are *correlata*, and the law will knit their estates together. *Curia advisare vult*. [Continued *post*, p. 369.]

( C. 443. )

*Semb. S. C. Pierson v. Nicholson*, 3 Keb. 252.

Whether cutlers' forges shall pay chimney money.

1 Will & M. stat. 1, c. 10. 1 Vent. 191-2.

MEMORANDUM, that it was made a question upon the act for chimney money, whether or no cutlers' forges should pay. And *Hale*, C. J. said, the reason of the resolution formerly given, that smiths' forges were to pay, was, because it was there expressly found, that they were fire-hearths.

*Hale*:—It is a business of great concern, whether your jewellers' fires that they make their *amel* at, and the barbers' fires where they warm their water, &c. shall pay; for that will depend upon this point. *Ergo advisare volunt*.

( C. 444. )

SIR NIC. STORTON'S CASE.

The justices at sessions may commit a fellow-justice for refusing to find sureties for good behaviour, upon the complaint of a third party. *Lambard. Eiren.* p. 80-1. *Id.* p. 385, (ed. 1619). 2 Hawk. c. 8, § 46.

At the sessions in Surry, where Sir Nicholas was a justice of peace, and was like to be presented by the jury for not repairing the highways, oath was made by one of the jurymen, that Sir Nicholas threatened him if he did present him, so that he durst not present him; whereupon the sessions ordered, that he should find sureties for his good behaviour, which he refusing to do, they ordered him to be committed, (but was let to bail by two justices of the peace): Whereupon he brought his *Certiorari*; and the question was, whether or no the sessions had power to commit him, being one of their fellow justices, *quia par in parem jus non habet*? And the Court held, that they might well do it, and that they had well done it; and bound him to his good behaviour here in Court, and to appear the next term; whereupon he had a *supersedeas*.

[ 355 ]

( C. 445. )

*Semb. S. C.* 3 Keb. 249.

*Accedas ad Cur'.* *Ante*, Case 65, p. 52.

It was resolved, that a sheriff may serve an *accedas ad Curiam* by his servant; and so *Hale* said it had been formerly resolved in one *Barrell's* case.

## CANE'S CASE.

*S. C. Cause v. Llemark*, 3 Keb. 223, 249.

**RESOLVED**, that a recognizance cannot be taken by an officer out of court, without a special custom.

Recognizance cannot be taken by officer out of court, without special custom.

( C. 446. )

## PRIDEAUX v. WARNE.

*S. C.* 2 Lev. 96. *T. Ray.* 232. 1 Mod. 104. 3 Keb. 249, 275.

**TRESPASS** for taking the sails of his ship.

The defendant says, that he had used to repair such a key, and in consideration thereof, if any vessel unloaded salt in the port, he used to have toll, and for default of payment to distrain the ship (a).

Whether the reparation of a quay be a sufficient consideration for a prescriptive claim of toll from ships unloading within the port?

The plaintiff took exceptions to the prescription:

1. Because it cannot suppose any reasonable consideration for the ground of it, that for repairing the key he should have toll of all ships within the port, which, as was affirmed, was seven or eight miles long; and he cited the case of *Perkins v. Cumberland* (1), 41 Eliz. and *Davison v. Herd*, 41 Eliz. A custom for a lord of a manor to have 3*l.* for a pound breach may be good within his manor, but it shall not bind strangers.

(1) 2 Rol. Ab. 266.

2. Here is a prescription to take the ship in default of payment of toll, whereas the master of the ship is in no default, but the owner of the goods.

*Hale* said, there are three interests in a port:

Acc. *Hale de Port, in Hargr. Tracts*, p. 72.

1. The propriety of it.

2. The public interest of it, for all the king's subjects to come thither.

3. The interest of the king to guard it.

As to the first objection, *Pollexfen* answered, that a man may prescribe for a thing out of his manor, as in *Sir H. Constable's* case, for wreck as far as he could see, &c.

*Hale*, C. J.:—The case of wreck differs much from this, for that is *nullius in bonis*. *Sed adjournatur*.

(a) See a more particular statement of the case in the report of Levinz. Judgment for the plaintiff. The toll here claimed is in the nature of a toll-thorough, 2 Lev. 97; as to which see *Haspurt v. Wills*, 1 Mod. 47. 1 Ventr. 71. *Crispe v. Behood*, 3 Lev. 424. *Mayor &c. of Nottingham v. Lambert*,

*Willes*, 111. *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402. *Lord Pelham v. Pickersgill*, 1 Term Rep. 660. *Truman v. Walgham*, 2 Wilson, 296. *Colton v. Smith*, Cowp. 47. *Rickards v. Bennett*, 1 Barn. & Cress. 223. *S. C.* 2 Dow. & Ry. 389.

[ 356 ]

## ROSE v. KING.

*S. C. ante*, p. 347-8.

**THE** declaration was *pro fractione, prostratione et dejectione* of his fences, with a *continuando*. The question was, whether breaking his fences lies in continuance?

Trespass for breaking fences may be laid with a *continuando*. So of walking with feet, or of eating the plaintiff's grass.

And it was admitted, that a general *clausum fregit* or *domum fregit* lies not in continuance, for they are not continu-

( C. 448. )

(1) 1 Sid. 224,  
249.

ed acts; and in the case of *Letchford v. Elliott* (1) lately in this Court, a trespass for casting logs into his close lies not with a *continuando*.

*Per Cur'*: *Pedibus ambulando* lies in continuance, and so doth eating his grass; and so in this case they resolved, that breaking fences may well lie in continuance, for a fence may be a mile long. *Jud' pro quer'* (a).

(a) See *ante*, p. 82, *Nicholls v. Reeve*. 20 Viner, 444, and cases there cited. Note 1, to 1 Saund. Rep. 24, by Willms. Cowp. 828.

( C. 449. )

BENNETT v. THERNE.

S. C. 3 Keb. 209, 220, 232, 250.

Plea by an officer justifying by the customary process of an inferior court, must shew that the custom was pursued. *Ante*, C. 114, 391, 399. *Smith v. Boucher*, C. T. Hardw. 69, 71.

TRESPASS against an officer, who justified by a process out of an inferior court; but because the custom was not pursued, judgment was against him. *Hale*, C. J. took this difference: If an officer for his excuse justifies by process, according to custom, out of an inferior court, though the custom be bad, the officer shall be excused [*ante*, C. 207], and the judgment is not void, but voidable; but if the custom be not pursued, the officer shall not be excused; as if a custom be alleged in a Court, after a plaint levied, to take out process, and he alleges that process was taken out, (but alleges no plaint levied), he is a trespasser (a). *Ante*, Case 197. *Post*, Case 514.

(a) See *Browne v. Hartshorne*, *ante*, p. 19, note (b).

( C. 450. )

VEZY v. DANIEL.

S. C. 3 Keb. 253.

An award that one party shall pay the other 10*l.*, and each shall release to the other, is good and mutual. *Ante*, C. 62 b.

DEBT upon an obligation to perform an award.

The defendant pleads *nullum fecerunt arbitrium*.

The plaintiff replies, that an award was made, that the defendant should pay unto the plaintiff 10*l.* and that each should make to the other good releases.

*Obj.* This is but an award of one part.

*Ans.* Good releases shall be intended releases according to the submission, and that makes it an award of both parts. *Jud' pro quer'* (a).

[ 357 ]

( C. 451. )

OKINGTON v. TOMPSON.

S. C. 3 Keb. 253.

*Indebitatus assumpsit pro diversis rebus*, good.

INDEBITATUS *assumpsit pro diversis rebus et mercimoniis*; adjudged that *rebus* is well enough. *Jud' pro quer'* (a).

(a) *Ante*, C. 122, 438. 1 Vent. 329.

( C. 452. )

HANCOCK v. HODGES.

S. C. 3 Keb. 253.

Trover for a pair of boots and spurs; or for a set of cur-

TROVER for a pair of boots and spurs, and doth not say how many spurs. *Per Curiam*:—It is well enough; for it shall be intended spurs belonging to those boots, which is a pair.

And *Wylde* said, that it had been adjudged, that trover for a set of curtains and vallance is well enough, without saying how many vallance; for it shall be intended vallance belonging to those curtains; and he said a replevin *de 4 ovibus matricibus et vervecibus* had been resolved to be ill, because he did not say how many *matrices*, and how many *verveces*, so that the sheriff could not tell how to make his return (a); but in trespass it was said that would be well enough.

And *Hale* said, that *una parcella tapetis, Anglice* a suit of hangings, was well. *Unum instrumentum, Anglice* a pedigree, is good; because, where there is no proper word, it shall be supplied with an *Anglice*. *Jud' pro quer' nisi*.

(a) *Vid. Alleyn, 33. Sty. 71. Cart. 218.*

tain and vallance, is good. *Post, C. 594, 598, 607. 2 Str. 738, 827, 809, 1015, and notes (b) and (c), C. 140, ante.*

*Post, C. 567, 590, 594, 607. Gilb. Com. Pl. 126-7. Ante, C. 68.*

( C. 453. )

### MATCHES v. BOUGHTON.

*S. C. Mathews v. Bowtel, 3 Keb. 218, 243, 253.*

ACTION upon the case, that whereas betwixt the plaintiff's house and the defendant's there was a little piece of ground, called a *twitchill*, upon which he, and all those whose estate he hath, had used to set their ladders to repair their house, and says, that he is *possessionatus* of the said house, &c., and that the defendant erected a wall there, *per quod* he could not set his ladder.

In pleading a prescription for an easement, it must be laid in him who has the fee. *Co. Lit. 113 b. Com. Dig. Prescription, H. 2 Mod. 318.*

*Et per Curiam*:—The plaintiff hath not well prescribed; for he hath laid the prescription in himself, and those whose estate he hath, and says that he was *possessionatus*, which cannot be intended but of a particular estate, as a lease for years, and a lessee ought not to prescribe in his own name.

*Cro. Car. 326. Cro. Car. 419.*

*Rainsford*:—If he had said *seisitus*, it might have been well enough.

\* *Wylde*:—It must have been *seisitus in feodo*, or else it might have been but an estate for life; but if he had laid it in the occupiers, perhaps it might have been good, being but an easement (a).

[ \* 358 ]  
*2 Cro. 665. Latch, 121.*

(a) See note (1) to 2 Saund. Rep. p. 113 a. *Grimstead v. Marlowe, 4 Term Rep. 719.*

### WAINRIGHT v. BEANE.

*S. C. 3 Keb. 254.*

( C. 454. )

ERROR to reverse an outlawry after judgment, because the return of the exigent was *ad Comitatus tent'* such a day, which was in figures.

Outlawry on final process.

If a man be taken upon a *Capias Utlagat'* after judgment, the party is in execution at the suit of the party without prayer; and if the outlawry is reversed, the party is discharged. *Per Wylde*.

*Hale*:—It is at the election of the party; for if the sheriff lets him escape, he may have his action; but he is not concluded, for he may chuse whether he will have him in execution or not.

1 Rol. 895.

( C. 455. )

EGEBURY v. ROSSENDER.

S. C. 1 Ventr. 253. 2 Lev. 94. 3 Keb. 254-9.

See ante, p.  
200. Post, p.  
421, 432.  
5 Mod. 352.

ACTION was brought for money won by horseracing, 100*l*.The defendant pleads, that there was 140*l*. more won at the same time upon trust.*Per Wylde*:—If above 100*l*. be trusted at the same time, all is lost, *per Stat.* 16 Car. 2, 7.

(C. 455 b.)

S. C. *England v. Clark*, 3 Keb. 254.

Error.  
1 Vent. 249.

If an action be brought against two persons, and one die before verdict, yet it is not error, if no judgment be entered against him.

( C. 456. )

SCOTT v. STONE.

S. C. 3 Keb. 255.

False latin.  
Variance.  
Post, C. 570.

DEBT upon a bond, and declares *per nonaginta libris*; and upon oyer it appeared to be *novenginta*. *Jones pro quer'*:—It is well enough; for in *Osborne's* case, 10 Co. 132, *septungenta pro septingent'* is well enough. *Tomson pro def'*: There is a difference when it is for payment of money, for then the condition explains it; but here the condition is for a collateral matter. *Et adjournatur*.

[ 359 ]

( C. 457. )

POOLE v. MOSELY.

S. C. 3 Keb. 255.

Accord and satisfaction is no plea to *scire facias* on a judgment. 6 Co. 44. 2 Lev. 212.

SCIRE *fa'* upon a judgment.

The defendant appears, and pleads an accord with satisfaction.

*Per Cur'*:—It is no good plea upon a judgment.

( C. 458. )

No protection is allowable in case of a breach of the peace, nor against a rule of the K. Bench(a).

IN an information for barrettry, it was said, the defendant stood upon his protection. But *per Cur'*:—There is no protection in case of the breach of the peace, nor against a rule of this Court.

(a) Co. Lit. 131 a. 3 Inst. 240. 2 Hawk. P. C. ch. 26, § 61.

( C. 459. )

CAPTAIN WATERS'S CASE.

S. C. 1 Ventr. 250. [by the name of *Captain C's* case.]

A soldier is not privileged from arrests; and a rescue by his fellow-soldiers is a riot.

A SOLDIER of his being arrested, he sent some of his soldiers to rescue him as he was coming from the counter to Ludgate; who, being about thirty in number, with drawn swords, rescued him.

The Court said, this was a very heinous misdemeanour, but they could make but a riot of it; but if they had taken upon them to rescue all the soldiers that were in the gaol, it



would have been high treason, for it is a kind of levying war against the king<sup>(1)</sup>; but here, it being but a rescue of a particular person, it is a riot only; and it was in this case declared by the Court, that no soldiers were privileged from arrests, but are as other persons subject to the king's officers, as justices, bailiffs, constables, and the watch, &c. (a).

(a) See the provisions of the Mutiny Act.

*Semb. S. C. Rex v. ———, 3 Keb. 255.*

( C. 460. )

A CERTIORARI was brought to remove an order of sessions made by the justices of Warwickshire, whereby they had ordered a parson to contribute to the repairs of a bridge. *Per Curiam*:—Clergymen are liable to all taxes charged since *Magna Charta*; and they shall contribute to the gaol and maimed soldiers, and to highways; and that clause, *Ecclesia Anglicana sit libera*, extends only to charges then in being (a).

Clergymen are contributory to the repairs of a bridge.

2 Inst. 2.

(a) 2 Inst. 704. 1 Hawkins P. C. ch. 76, § 15, and see post, *Webb v. Batcheler*, p. 396, 457, 488.

SILLEY v. SILLEY.

Continued from p. 350.

[ 360 ]

( C. 461. )

Now, *per Curiam*, a *Supersedeas* was granted; and a difference was taken between this case and the *Lady Wortley's*, for there the prorogation being for two or three terms, it was great delay; but here, it being but from the 3rd of November till the 7th of January following, it cannot be said to be for delay.

## DE TERM. S. HILARII, 1673.

IN BANCO REGIS.

TAYLOR v. HOLMES.

( C. 462. )

S. C. 2 Lev. 101. T. Raym. 233. 3 Keb. 264, 276, 296, 302, 335.

THE defendant had brought an action of trover and *assumpsit* against the plaintiff, and recovered, and laid them both in one declaration; which was assigned for error; and the sole question was, whether trover and *assumpsit* might be laid in one declaration? It was agreed, that debt and *detinue* may be joined together, because every debt supposes a *detinue*, and they are of the same nature; and so for several debts a man may declare for 100l. and allege several debts to make it out. Bro. *Joyndre en action*, 37, 97. But debt\* and trespass cannot be joined, because one is for a duty, the other for a tort; and so here the *assumpsit* is for a duty, and the trover for a tort; and *Levinz*, who argued for the defendant in the writ of error, relied upon Cro. Car. 20, *White* and *Rysden*.

Counts in trover and *assumpsit* cannot be joined. Acc. 3 Wils. 354. 1 Term Rep. 276-7. 1 New Rep. 43.

[ \*361 ]

*Sed semble a moy q' il case ne vient al ceo; q' tort il ne arise de mesme foundation. Curia advisare vult. [S. C. continued, post, p. 367.]*

( C. 463. )

LOMAX v. ARMORER.—*Trin.* 1673. *Rot.* 434.

S. C. 2 Lev. 98, 123. T. Ray. 233. 1 Ventr. 267. 3 Keb. 277, 326, 421.

An inferior court cannot hold plea of freehold, as of dower, by bill (a).

1 Rol. 798.

1 Sal. 339.

A WRIT of dower was brought by bill in the court of Newcastle, and judgment being there given for the plaintiff, a writ of error was brought; and assigned for error, that base courts cannot hold plea of matters of freehold. Britton, 128 b. Nat. Brev. 47 a. 2 Inst. 311. Cro. Eliz. 101. 44 Ed. 3, 28, 37. 50 Assise, pl. 9. Though a fine may be levied in a base court, yet that is an amicable writ, and is no more than a feoffment; and yet it is held, that a prescription to levy a fine in a base court is not good. Cro. Eliz. 314, 117. Owen, 93 (b). And the reason is, because the king would lose his king's silver; and that is the reason, that of ancient demesne lands a fine may be levied, because there no king's silver is due to the king. *Advisare vult Cur'.*

*Postea Term. Hil. jud' fuit reverse.*

(a) It must be by writ, except perhaps by special custom. See S. C. in the other reports. *Cannon v. Smallwood*, 3 Lev. 204.

(b) As to levying fines in inferior courts, see Coke's Reading on Statute of Fines, Lect. 8. 5 Cruise's Dig. 112-3-8, 2d edit.

( C. 464. )

BRINGATE v. BOHUN.

S. C. *Bohun v. Springat*, 3 Keb. 277.

No custom can be alleged in a court held by letters patent.

ERROR to reverse a judgment in Monmouth.

The error was, the Court is said to be held by letters patent, and by a writ of right patent makes protestation to sue in nature of an assise *secundum consuetudinem curiæ illius*; whereas it is impossible there should be any *consuetudo*, if the Court were held by letters patent.

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DE TERM. PASCHÆ, 1674.

IN BANCO REGIS.

( C. 465. )

BENSON v. HUDSON.

S. C. 2 Lev. 28. 1 Mod. 108. T. Ray. 236. 3 Keb. 274, 287, 292.

Feoffment to the use of B. in tail, remainder to C. in tail, &c. provided that on failure of B.'s estate tail, D. shall have a rent

A. BEING seised in fee, makes a feoffment to the use of B. and the heirs of his body, remainder to C. and the heirs of his body, &c., provided, that if B. shall die without heirs of his body, then D. shall have a rent issuing out of the lands; B. makes a lease for 1000 years, and then levies a fine and suffers a recovery, and dies without issue. D. distrains for

the rent, and the tenant of the land brings a replevin.—  
Two questions:

1. Whether or no this rent were not barred by the recovery as well as the remainder, if no lease had been made?

2. Whether or no it should continue during the lease?

*Obj. 1.* As to the first point it was objected, that the reason of a bar of a common recovery was from the supposed recompence in value that went to the remainders, and this being a case where recompence cannot possibly enure, (viz. to this rent issuing out of the land) the reason of the bar failed, and so by consequence the effect of it.

*Obj. 2.* It was objected, that in judgment of law, the creation of this rent shall precede the creation of the estate-tail, as it shall in many cases, *ut res magis valeat quam pereat*, as appears in *Whitlock's* case, 8 Co. and 1 Co. *Bredon's* case, and in Cro. Eliz. 792, *White and Gerish's* case, where a render in a fine is made to one in tailrendering rent, and if tenant in tail died without issue, *quod tenementa prædicta remanebunt* to another in fee; it was adjudged there, that although all were by one fine, yet in judgment of law it should operate as at several times, viz. as rendering the tail at one time and the reversion at another, because the reservation should not be void; and there although a common recovery was suffered, yet it was resolved, that the rent by that was not extinct.

*Ad primam:* It was answered by *Hale*, Chief Justice, that the reason of the bar of a common recovery, is not from the supposed recompence only, but the remainders and all charges created upon it are barred also for this reason, because when a recovery is suffered by a tenant in tail, it doth operate by way of continuance and protraction of the estate-tail; so that whereas before there was a possibility that the remainders might come into possession, now that possibility is destroyed, as it is said in *Capell's* case; and for that reason all charges created by the remainder-man fall to the ground; and (he said), this privilege of barring the remainder, is, as it were, the antient privilege which was at the common law, which is preserved notwithstanding the statute *de donis* (c) for those estates, which are now intails, were at the common law fees conditional, and no remainder could be limited upon them; and the party *post prolem suscitutam* might have aliened to whom he had pleased, and notwithstanding by the statute *de donis* this was made such an estate as a remainder might be limited upon, yet the antient privilege of aliening absolutely (by a common recovery) hath been all along continued to him; so that the recompence supposed is

out of the land: B. creates a term of 1000 years, and, after levying a fine and suffering a recovery, dies without issue: held, that the rent is barred by the recovery, and is not preserved during the term (a).

[ \*368 ]

2 Rol. Rep. 221. Golds. 5.

A recovery suffered by tenant in tail operates by way of continuance and protraction of the estate tail (b).

1 Co. 62.

(a) *Vid. Martin v. Strachan*, Willes, 456. *Howard v. D. of Norfolk*, 2 Freem. p. 76-7. *Gulliver v. Ashby*, 4 Burr. 1929. *Driver v. Edgar*, Cowp. 379, 382. 1 Prest. Conv. p. 1, 2.

(b) *Acc. Howard v. Duke of Norfolk*,

2 Freem. 77. *Martin v. Strachan*, 5 Term Rep. 110, n. Pigot, 21. 2 Bl. Com. 350.

(c) See observations in *Ratcliffe's* case. 1 Stra. 272, 289, 296. *Martin v. Strachan*, 1 Wils. 73.

King's Bench, and upon trial the jury gave 6s. 8d. damages, and 40s. costs; and the Judge before whom it was tried certified, that the assault was sufficiently proved. \* The question was, whether or no, in this case, the plaintiff should recover any more costs than damages? And three points were moved.

1 Ld. Ray. 181.  
[ \* 366 ]

1. Whether or no the Judge had sufficiently certified, because it was, that the assault (and not the assault and battery) was sufficiently proved? [*Vid.* 1 Vent. 256.]

2 Vent. 36.

2. Whether or no, if the costs and damages given by the jury exceed 40s. it shall be within the act?

Post, p. 374,  
S. P.

3. Whether an action commenced in an inferior court originally, and afterwards removed hither, shall be within the act? And as to this point I was told, that the Judges of the Common Pleas had adjudged, that it was as to this all one as if an action began here.

Ante, p. 214.

4. I was told that the Judges at Serjeants Inn had differed in their opinions, whether or no actions of the case were within the act; but the opinions of most were, that they were not, nor none but those named, viz. trespass and battery.

## ( C. 468. )

### ANONYMUS.

*Semb. S. C. Cary v. Ward, 3 Keb. 298.*

If one of several defendants die after judgment, execution survives as to the personalty, but not as to the realty. 4 Mod. 315. Comb. 441. And see the notes to 2 Saund. 50 a. 72 k.

A JUDGMENT was obtained jointly against three persons, and one of them dies, and the party who obtained the judgment sued a *scire facias* against the executor of him that was dead, and the two survivors. The question was, whether or no the executor was liable to be sued, or whether the charge did not survive? And *Saunders* of counsel with the executor, cited a case of *Norton and Harvy* (a), where *Harvy* being executor was sued, and pleaded several judgments, and that he had fully administered, and amongst other judgments pleaded one which was recovered against his testator and an estranger; and because he did not aver, that his testator survived, the plea was ruled to be ill: And in this case the Judges seemed to incline, that the charge did survive, and the executor was not liable; but he might, *per Wylde*, have sued a *scire facias* against the heir and the two survivors, because as it charged the realty, it did not survive; but he could not charge the executor.

(a) *S. C. 2 Saund. 50. T. Ray. 158.*

## ( C. 469. )

*Mandamus* granted to swear a churchwarden. *Ante*, C. 26. 1 Vent. 267.

MANDAMUS was prayed to swear the churchwarden of Wapping; and it was granted *per Curiam*, because it is a temporal office. *Style*, 299, 355.

( C. 470. )

It was said *per Hale*, that a release of all demands will not release any thing of a rent more than the arrearages then due, neither will a covenant not broken; as if a man release all demands that he hath against him. [2 Cro. 487] (a).

A release of all demands does not release future arrears of rent, nor an unbroken covenant. A release of all right in the land extinguishes rent.

But if he release all his right in the land, this will extinguish the rent. [2 Ro. Rep. 18] (b).

(a) *Ante*, p. 194-5, 235.

(b) *Post*, p. 474. 3 Keb. 244.

## TAYLER v. HOLMES.

( C. 471. )

Continued from p. 361.

THE Court seemed to incline, that they would not lie together; but *Wylde* said, that it was held by *Rolle*, that if they were laid together, and the defendant demurred, it would be bad; but it might be helped by a verdict; but *Hale* said it was held in *Flowerden* and *Kenwick's* case, that they would not (a). *Per Wylde*:—An executor may in the same declaration declare for rent due in his own time, and for that which accrued in the testator's time. *Advisare volunt*.

An executor may join demands for rent, which accrued in the testator's time and his own (b).

(a) *Vid.* 2 Lev. 101. 3 Lev. 99. That the misjoinder may be cured by a distinct finding of the jury on the several counts,

see *Kightly v. Birch*, 2 Mau. & Sel. 533.  
(b) *Thompson v. Stent*, 1 Taunt. 322.  
*Powley v. Newton*, 6 Taunt. 453.

## TAYLER v. HERBERT.

( C. 472. )

S. C. 3 Keb. 303.

INDEBITATUS ASSUMPSIT for 10*l.* and a *computasset* for 35*l.* in the same declaration. The defendant pleads the statute of usury to the *indebitatus*, and avers, that both the *indebitatus* and the *computasset* were for the same cause of action.

When a declaration in *assumpsit* contains an *indebitatus* count and a *computasset*, a plea of usury to the former with an averment that both are for the same cause of action, is bad.

It was said, that the pleading that the *computasset* was for the same thing, did amount to the general issue, and it will appear upon the evidence.

It was resolved, that the averment was naught; for the ground of the *indebitatus* is the debt, and the ground of the *computasset* is the account; and so it cannot be averred that there is the same cause of both, especially as it is here, where one is for 10*l.* and the other for 35*l.*

But *Hale* said, he should have pleaded the statute to the *indebitatus*, and then, that afterwards they came to an account for the same wares, &c. (a).

And in this case it was said, if a man plead only to part, the plaintiff shall have judgment for the whole.

*Vid.* 1 Ld. Ray. 231. Com. Dig. Pleader, E. 36.

(a) As to this mode of pleading by averring the identity of the several causes of action stated in different counts, see *Sheldon v. Clipsham*, T. Raym. 449.

T. Jones, 158. *Aitkenhead v. Blades*, 5 Taunt. 198, 200. 1 Vol. Chitty on Pleading, p. 533-4, 2d edit.

## (C. 472b.)

Error in fact is assigned in the

[ \* 868 ]  
same court. F.  
N. B. 21. Com.  
Dig. Pleader,  
3 B. 1.

ERRORS in fact may be assigned in the same Court *coram vobis residet*.

\* *Hale* said, the reason why it was done in the King's Bench was, because *Nisi Prius*'s have rarely been awarded from the Exchequer Chamber, though sometimes they have (a); and he said, it is a thing that is never done in the Common Pleas, but they bring error in the King's Bench (b).

(a) *Vid.* Cro. Car. 514. 2 Lev. 38. 1 Vent. 207. Cro. J. 5. 2 Mod. 194. 1 Str. 690. Com. Rep. 597. 1 Chit. Rep. 372.

(b) *Vid.* *Binus v. Pratt*, 1 Chit. Rep. 369.

## (C. 473.)

## DERING v. FARINGTON.

S. C. 1 Mod. 113. 3 Keb. 304.

If A. "sells, assigns, and transfers" to B. (by deed) money due to A. from a third person, covenant lies by B. against A. for not permitting him to receive it (a).  
10 Mod. 223.

THE plaintiff declares, that the defendant *vendidit, assignavit et transposuit* 500*l.* to him, that was owing to the defendant by J. S. and that he did not permit him to receive it.

Two questions were moved:

1. Whether these words should amount to an implicit covenant? And it was argued by *Tomson* that they should not, although it were in case of an interest passed, or a possession given; and for that he cited Cro. Eliz. 157. 1 Leon. 179. 1 Roll. 519. *Bedford v. Bull*.

2. Admitting they would amount to an implicit covenant, yet this being to transfer a chose in action, and so void, the implicit covenant is also void; and for that he cited Owen, 136.

*Per Hale*:—Although these words may not amount to an implicit covenant against eigne titles, yet they may be good against the party himself and his acts.

On a lease for years rendering rent to a stranger, the lessor may bring covenant for non-payment, but the stranger has no remedy (b).

As a lease for years, *reddendo* a rent to a stranger, though the stranger can have no remedy, yet if the rent be not paid to him, the lessor may have an action of covenant. *Sed agreeatum fuit, et nul judgment dat'*.

(a) Acc. *Caister v. Eccles*, 1 Ld. Ray. 683. *Seignoret v. Noguire*, 2 Ld. Ray. 1242. *Frontin v. Small*, *Id.* 1419. S. C. 1 Str. 705. *Saltoun v. Houstoun*, 1 Bing. 433. That covenant lies for any act done by the defendant which destroys or defeats the effect of his grant, see *Pomfret v. Ricroft*, 1 Saund. 322. *Seddon v. Senate*, 13 East, 63, 78. And *Barton v. Fitzgerald*, 15 East, 538.

(b) *Frontin v. Small*, 1 Str. 705. *Sackeverell v. Froggatt*, 2 Saund. 370, note 5. That a stranger cannot sue upon a covenant made for his benefit in a deed *inter partes*, see *Lowther v. Kelly*, 8 Mod. 115. *Gilby v. Copley*, 3 Lev. 139. *Salter v. Kidgely*, Carth. 76. *Ex parte Richardson*, 14 Ves. 187; and note (a) in 3 Bos. & Pull. 149.

## (C. 474.)

The liberty of the Rolls is not a privileged place.

IT was said by *Hale*, that the liberty of the Rolls is no privileged place, but as it is for all other Courts *eundo et redeundo*.



## CROSSE v. SEYDAMORE.

( C. 475. )

S. C. more fully, 1 Vent. 137. 2 Lev. 9. 2 Keb. 754, 784. Affirmed on error, 1 Mod. 175.

THE case was: A. in consideration of natural love to his son did bargain, sell, give, grant, alien, infeoff, release and confirm unto his son; and it was found, that no money was paid upon the conveyance, nor none mentioned to be paid upon it.

\* The question was, whether or no this should amount to a covenant to stand seised by reason of the words "bargain and sell," &c.?

And resolved *per Curiam*, that it should; and upon a writ of error the judgment was affirmed; *Vaughan and Thurland contradicen'* (a).

A bargain and sale without a pecuniary consideration may operate as a covenant to stand seised. 22 Viner, 211.

[ \* 369 ]

(a) Acc. *Barker v. Keate*, ante, p. 251-2. *Walker v. Hall*, 2 Lev. 213. *Hollman v. Senhouse*, post, p. 460-1. *Samson v. Jones*, 2 Vent. 318. *Osman v. Sheaf*, 3 Lev. 370. *Roe v. Tramarr*, Willes, 682. S. C. 2 Wils. 75. *Doe v. Salkeld*, Willes, 673. 2 Fonbl. Treat. of Equity, p. 46. n. (b), 5th edit. 4 Cruise Dig. 133-4-5, 2d edit. Sugden's Gilb. on Uses, 251-2-3, notes, 3d edit.

## THE KING v. RICHARDS.

( C. 476. )

Semb. S. C. 3 Keb. 312.

RICHARDS was outlawed for felony before the general pardon, which pardoned both the outlawry and the felony. The lord entered upon his lands for an escheat, (*semble q' fuit* before the pardon) so that he was fain to bring a writ of error to reverse the outlawry, that he might be restored to his lands; and it was said, that his heir might have reversed it, if he had died.

After outlawry for felony and a pardon, the outlaw or his heir must reverse it by writ of error, in order to recover lands escheated.

## DE TERM. S. TRINITATIS, 1674.

IN BANCO REGIS.

## PYBUS v. MITFORD.

(C. 476b.)

Continued from p. 354.

THIS case was now argued by the Judges.

And *Twisden* was of opinion, that here was no new estate for life created in the covenantor by implication, and so by consequence to make him tenant in tail, by connecting his estate for life and the limitation to the heirs male of his body by his second \* wife, and so by consequence the limitation was void; for if Michael was not seised of an estate tail, so that Ralph might take by descent, he can never take by purchase; because he that takes by purchase must be a complete heir; and that he could not be so long as John was living, though he might be a special heir, so as to take by descent, if it be an estate tail. † Inst. 26 b. And he held

A., seised in fee, covenanted to stand seised to the use of the

[ \* 370 ]

heirs male of his body by his second wife: held that A. took an estate for life by implication, and that the estate tail be-

came executed in him.  
An heir special may take as a purchaser by that description, although not the heir general.  
*Per Hale, C. J.*

here, that the covenantor is always seised of his old use, and it never goes out of him, by reason there was no person to take as his heir male by the second venter, by way of purchase; and he said, that here can no use be said to return to the covenantor during his life, because here is no settled estate from whence it should return.

And besides, in a conveyance an estate shall not be raised by implication, although it may in a will. Cro. Eliz. 367.

And he said, that if a man possessed of a term for 1000 years devise it to his executors after the death of his wife, the wife shall take no estate by implication. Moor, 635.

Or if a man devise an estate to a younger son after the death of J. S., here J. S. shall take no estate for life; because an heir shall not be disinherited by an implication, unless it be a necessary one; as a devise to his heir after the death of J. S., then J. S. must take, because there is no body to take; because it appears plainly that his intent was, that his heir should not have it till after the death of J. S. but in the case before, the heir shall have it during the life of J. S.

*Ante, C. 9.  
Post, C. 625.*

And he said, it may be a question, if the intent of the covenantor doth not appear plainly, that he would not take an estate for life.

1. Because, as to the other part of the lands, he limits to himself an estate for life expressly, and here he omits it.

But to that *Hale* answered, that there it was necessary, because Jo. being named, had otherwise had the estate presently.

2. He covenants to stand seised to those uses mentioned, expressed and declared in the deed, and so declaring none to himself for life, it is not reason to raise one by construction.

[ \* 371 ] And he said, he did not understand my Lord *Coke's* comment upon the case of *Fenwick* and *Mitford*, 1 Inst. 22, where he says, that the law creates a use in him during his life till the future use come *in esse*; for where it is limited to the heirs, it is the old use, and would descend \* without such a circuitry of a use returning to him for his life.

And in this case he said, after this limitation the covenantor was seised of his old fee, which was determinable upon a contingent, *i. e.* if he had such an heir male by his second wife as was capable of taking by purchase.

But *Wylde*, *Rainsford* and *Hale* argued against him.

And *Wylde* and *Rainsford* held in this case, that the heir could not take as a purchaser, because he is not a complete heir.

But *Hale* was of opinion, that if here had not been an estate for life created by implication in Michael, so as that Ralph might be in by descent, yet he held, that he might well take as a purchaser; and though he were not a complete heir, yet he was a special heir by the second venter,

and that might be a sufficient denomination of him as a purchaser. For,

1. That was such an heir as the common law took notice of.

2. The covenantor in this conveyance takes notice of John as his heir apparent; and therefore it cannot but be intended that he meant an estate to Ralph by that name. Besides, it would be inconvenient in some cases, if such an heir should not be a sufficient name to take by purchase; as if an estate was made upon such a condition as is in Litt. sect. 352, and the feoffor should die, as in that case, if this should not be a good name of purchase, the condition would become impossible, because the remainder would be void; and he said he had never seen any case where it had been adjudged to the contrary.

But as to the other point these three agreed, that Michael took an estate for life by implication; and then the estate being limited to his heirs male by his second wife,

1. It was agreed by them all, that the heir in this case did not take by purchase, but was in by descent.

For a man shall never make his right heir a purchaser, by the name of *Heir*, without departing with the whole fee, which he doth not, where an estate results by implication for life; for where the ancestor takes an estate for life, his right heir shall never be a purchaser. 1 Inst. 319 b.

A man shall never make his right heir a purchaser, by the name of *heir*, without parting with the whole fee. *Ante*, C. 224.

And *Hale* said, and so did the other two, that in this case he must necessarily take an estate for life; for in case of a covenant to stand seised, so much as the covenantor doth not part with, remains in himself, 1 Co. 154. 1 And. 259: for there is a necessity that the estate must lodge in some body.

*Moor*, 193.

\* And this limitation to the heirs male of his body, &c. is as much as if he had said "to him and the heirs male, &c." There is a great difference between an estate executed at common law and the raising of a use; for if a man had given an estate to A. for life, the remainder to the heirs of his body, this had been void. Dy. 156. But of a limitation of a use it is good enough. 1 Roll. 239.

[ \*372 ]

*Ante*, C. 224.

This is perfectly according to the intent of the party, and that is the best guide in construction of deeds, so long as the rules of law are not violated thereby; it is plain here, that he did intend an estate for this son, which by this construction will be made good.

*Obj.* Here the covenantor is seised of his old estate till this new use arise, which is but upon a contingent; and till that arise he is seised of a fee which cannot join with this, so as to make an estate tail.

*Ans.* It is the old estate; but it is so modified, that it cannot descend, and may well consolidate with this estate; and the fee doth not rest in him till the contingency fall; for in *Pagett's* case, if he had had more than an estate for life, there could have been no *amoveas manum*; for if a man that hath

a fee determinable upon contingencies be attainted of treason, &c. before the contingents vest, they are all destroyed.

No estate can arise by implication in a deed: *aliter*, in a will. 2 Fonbl. Equity, p. 54, 136, 5th edit. But an old estate may be moulded and qualified by implication.

*2d Obj.* No estate shall rise by implication in a deed, though it may in a will.

*Ans.* Here is no new estate to be raised, but the moulding and qualifying of the old estate that was in him before.

*3d Obj.* A man cannot give an estate immediately to his heirs, as Hob. 32. A devise to his heirs is void, and the heir shall be in by descent.

*Ans.* If such a devise be qualified, it is good; as a devise to his heirs, paying 20*l.* to B., is good, and the heir shall be in by purchase (1); and he said the Lord *Pagett's* case resolved by all the Judges of England, is express, that an estate for life by implication shall be raised. 1 Co. 154. And. 259.

*Jud. pro def. contra opinionem Twisden (a).*

(a) See *Southcott v. Stowell*, ante, 596. 4 Mod. 153. 2 Fonb. Tr. Eq. 135, p. 216, 225, and the cases and books 136, 5th edit. *Post*, p. 470. referred to in the notes there. 1 Atk.

( C. 477. )

Where a *prohibition* lies in the case of an undue grant of administration; and where a *mandamus*.

ADMINISTRATION being granted to one creditor, another sues to have it repealed, and to have administration granted to him; and the Court granted a prohibition, the second administration being ready to be sealed; but if it had passed the seal, then *per Hale*, they would have granted a *mandamus*.

[ 373 ]

DE TERM. S. MICHAELIS, 1674.

IN BANCO REGIS.

( C. 478. )

*S. C. Austin v. King*, 3 Keb. 347, 437.

Costs against an infant lessor in ejectment. *Stra.* 694, 932. *Cowper*, 128.

AN infant of twelve years of age was lessor in ejectment; the lessee was nonsuit; the father of the infant that prosecuted the suit was dead; 50*l.* costs were given to the defendant; whereupon the Court made a rule, that the lessor should pay costs. It was doubted in this case, because of his infancy; but if his father had been alive, they would have made him pay the costs; or if he had left assets, his executor should; but here was no body but the infant to be charged. *Adv. vult.* [See 3 Keb. 437.]

( C. 479. )

DEKINS'S CASE.

An excessive seizure of goods under a *justices*

HE was a bailiff of London, and a *justices* coming to the sheriff, he seized the defendant's goods, and pretended he

would carry them away; whereupon one of the defendant's friends promised, that they should be delivered to the plaintiff in satisfaction of his debt. held illegal, and the bailiff committed.

But the Court caused the plaintiff to discharge the promise, and to deliver the goods to the defendant, because the seizure was illegal; for upon a *justicies* the sheriff ought only to take a porringer, or some such small thing, to make the party appear.

The bailiff was committed (a).

(a) *Anon.* Salk. 201. *Weld v. Wiggett*, ante, p. 321, and note (d), *ibid.*

[ \* 374 ]  
( C. 480. )

MEMORANDUM, that a *mandamus* was sent to the Prerogative Court for to command them to prove a will (a). Style, 8. Mandamus to prove a will.

(a) 3 Keb. 344, 350. *Ante*, C. 477. 1 Vent. 335.

( C. 481. )

*Semb.* S. C. *Gavel (or Dunel) v. Skidmore*, 3 Keb. 357, 423. 2 Lev. 124.

AN action of trespass being brought in an inferior court, the defendant removed it into the King's Bench, and there the plaintiff recovered only 15s. damages. The question was, whether he should have any more costs than damages, because this action was not originally commenced here? And *Twisden* and *Rainsford* inclined, that he should not, for this action might be well said to be commenced here; for when the cause came here, the plaintiff declared anew; and so they said it was held in the case of *Smith* and *Neesom* [ante, p. 365]; but *Wylde* seemed to incline to the contrary, because he said here it was the defendant's own fault to bring it hither, and he should not take advantage by his own act. *Et adjournatur*, *Hale* absent; and afterwards the Court was informed, that the Common Pleas had ruled it, that in this case the plaintiff should have his costs, because the statute says, "Suits commenced in the Courts at Westminster:" But *Wylde* said, that when the cause is removed hither, the plaintiff declares anew, and begins again; for otherwise no writ of error would lie upon a judgment here in a cause removed out of an inferior court upon the 27 Eliz. c. 8; for that statute says, "first commenced there." *Adjournatur* (a).

An action of trespass in an inferior court is removed by the defendant into the King's Bench: *quære*, whether the plaintiff's costs shall be restrained by 22 & 23 Car. 2, c. 9.

*Semb.* Error lies in the Exchequer Chamber on a judgment in a cause removed into B. R. out of an inferior court.

(a) See 3 Salk. 115. 1 Ld. Ray. 395. *inferior courts are now provided for by* 58 4 Mod. 378. Gilb. C. P. 270. Com. Dig. Geo. 3, c. 30. Costs, A. 3. Actions of trespass in in-

### THE KING v. NUTON.

S. C. 3 Keb. 353, 356, 367, 388. 2 Lev. 111.

MOVED in arrest of judgment, because it is said *scriptum indentatum* (and doth not say, that it was sealed), whereby his freehold was molested, and the words of the statute are, "deed, charter, or writing sealed" in that part of the statute that relates to freehold; but in the other it says only, "charter, deed, or writing," where it relates to a term for years.

An indictment on 5 Eliz. c. 14, stating the forgery of "a writing indented," without saying, that it was sealed, is insuffi-

( C. 482. )

cient. 1 Hawk.  
P.C. c. 70, § 26.  
2 East, P.C. c.  
19, § 33, p. 919.  
3 Keb. 486.

[ \* 375 ]

The clerks of the court said, that the precedents of the court had been both ways, and thereupon the Judges inclined, that it might be well; but *Twisden* said, if the matter had come now anew before them *re integrá*, he should think they ought to pursue the words of the statute; as \* upon the statute of usury, an information is not good unless it be said *corruptè*. 11 Co. 58.

And upon the statute of striking in the church-yard, it is not good, unless it be laid *malitiosè*, for the words of the statute ought to be pursued.

*Wylde* said, in the Common Pleas they declare upon a bond *per scriptum suum obligatorium*, without saying *sigillatum*.

*Ante*, C. 289,  
p. 265. Cro. El.  
571.

*Saunders* answered, that may be good, for it shall be intended sealed, otherwise it could not be *obligatorium*. And so if this had been *factum indentatum*, it had been good enough, for *factum* had implied sealed. *Adjournatur*, *Hale* absent.

But afterwards in this term, the Court were of opinion, that it was not good. *Si le date soit misprise n' est bone*. 13 Co. 34.

( C. 483. )

ASTMALL v. ASTMALL.

S. C. 2 Lev. 117. 3 Kebl. 360, 394.

*Sensé*. A view is not grantable at common law in a writ of dower *unde nihil habet*. Dy. 179 a. Com. Dig. View, B. Booth, R. A. p. 88, 167.

ERROR to reverse a judgment in C. B. in a writ of dower *unde nihil habet*, because the view was not granted; and it was alleged, that although in a writ of right of dower the view is grantable, yet in dower *unde nihil habet* it never was at the common law; because the woman that had nothing to maintain her, should not be delayed in the recovery of her right. 45 Ed. 3, 17. 2 Roll. 725. Co. Ent. 177. Rast. Ent. 239. 2 Inst. 481. 34 H. 6, 10, 3.

( C. 484. )

OKE'S CASE.

S. C. *Oky v. Sell*, 2 Lev. 103. 3 Keb. 320, 361.

Bond to the warden for ease and favour is void at common law (a).

OBLIGATION to the Warden of the Fleet, conditioned for true imprisonment. The defendant pleads that it was for ease and favour. The plaintiff demurs. *Jud' pro def'*. The bond is void at the common law, and the plaintiff might have taken issue (1), that it was not for ease and favour.

(a) Accord. 1 Lev. 209. 1 Saund. 161. Hardr. 464. 1 Salk. 438. 1 Mod. 111. 3 Viner, 449.

( C. 485. )

FREKE v. FINCH.

Bail in error are estopped by the record remitted by the Exchequer Chamber to the K. B.

SCIRE FACIAS upon a recognizance (given in a writ of error) against the bail, to pay, &c. if the judgment were affirmed in the Exchequer Chamber.

The defendants plead, that the judgment was not affirmed, *prout patet per recordum* in the Exchequer Chamber.



The plaintiff replies, that the judgment was affirmed in the Exchequer Chamber, *prout patet per recordum* that was \* sent by *Mittitur* into the King's Bench, and demands judgment, whether the defendants shall be admitted to aver against this record. Resolved they were estopped. [ \* 376 ]

## LEECH v. VERE.

( C. 486. )

S. C. *Leech v. Beer*, 3 Keb. 229, 363.

THE defendant covenanted with the plaintiff to pay his own wife 50*l.* *per annum* for separate maintenance; provided nevertheless and upon condition, that the wife should reside at such place as J. S. and J. D. should appoint and approve of.

The defendant pleads, that she did not reside at such place as J. S. and J. D. did appoint and approve of.

The plaintiff replies, that J. S. and J. D. did not appoint and approve of any place.

The defendant demurs, because this residence is in the nature of a condition precedent, and so, there being no performance of it, he ought not to have his action.

But it was resolved *per Curiam*, that it was a condition subsequent, and so, there being no breach of it, the plaintiff hath good cause of action; and though they did appoint no place, yet it shall be intended that they did approve of that place where she did reside, unless the contrary were shewed. *Jud' pro quer'.*

Covenant to pay A. an annuity, on condition that A. shall reside wherever B. & C. shall appoint and approve: this is a condition subsequent, and A. may reside at any place so long as B. & C. appoint no other.

## GARRETT v. BASKERVILL.

( C. 487. )

S. C. 3 Keb. 363.

IN an information against the defendant for ——— (a) the defendant pleads, that the informer did not swear his information: and resolved to be no plea; for although the officer be punishable for taking it without oath *secundum* stat. 21 Jac. yet the information is well enough without it. Cro. Car. 316.

In an information on a penal statute, it is no plea that the informer was not sworn.

(a) For printing without licence. *Vld.* 13 & 14 Car. 2, c. 33. 3 Keb. 363.

## THE LADY LEE OF STONELY.

( C. 488. )

S. C. 2 Lev. 128. 3 Salk. 139. 3 Keb. 433. and more fully in Bac. Abr. *Habeas Corpus*, (B), 3.

MEMORANDUM, that a *Habeas Corpus* was granted for the Lady Lee, upon a suggestion of her being locked up by her husband and abused, and none of her relations suffered to come near her; and a precedent was cited, where the like had been done in the case of Sir *Philip Howard*; and the Court said, if these things are proved upon oath, there is good cause to bind the Lord Lee to the peace and \* good behaviour; but she being kept up could not come to exhibit

*Habeas corpus* granted on suggestion that a lady was confined and ill-treated by her husband: and the husband

[ \* 377 ]

bound to the peace and good behaviour.

articles upon oath, and so they could not grant a *supplicavit*; but when she comes up she may swear these things (a).

(a) See *Queen v. Lord Howard*, 11 Mod. 109. *R. v. Lister*, 1 Stra. 478. *Ld. Vane's case*, 2 Stra. 1202. *R. v. Ld. Ferrers*, 1 Burr. 631. *Anne Gregory's case*, 4 Burr. 1991. *R. v. Brotherton, C.* T. Hardw. 74. *R. v. Doherty*, 13 East, 171. And further as to the husband's power of correction and confinement, Bac. Ab. Baron and Feme, (B). 4 Viner, 172-3. 1 Bl. Comm. 444-5.

( C. 489. )

JENKINS v. HERMITAGE.

S. C. 3 Keb. 367.

Covenant lies against the executor of the lessee for non-payment of rent upon an express covenant, although the defendant have assigned over before the rent became due. 3 Mod. 325.

COVENANT was brought against the executor of the lessee for non-payment of rent, upon an express covenant.

The defendant pleads, that before the rent became due he assigned over to J. S.

The plaintiff demurs.

It was said by the Court, that though the defendant had assigned over before the rent became due, yet he might be charged as executor upon the express covenant; but he could not be charged as assignee, if he assigned over before the rent became due; and here the plaintiff hath election either to charge him as assignee or executor; and having charged him as executor, it is no plea; for as he might have charged the testator upon this express covenant after assignment, so he may the executor; but then judgment shall be only *de bonis testatoris*. *Et concessum est, q' action de det ne gist versus executor apres assignment accord. al Walker's case*, 3 Co. 24. *Uncore action de covenant bien gist*. 2 Cro. 522. *Et issint est com. q' le lessor ad accept del rent per les mains de assignee* (a).

Post, C. 520.  
Cro. Car. 588.  
Jones, 223.

(a) See *Boulton v. Canon*, ante, p. 336; and notes, *ibid*. 1 Wils. 4. 10 East, 312. *Jevens v. Harridge*, 1 Saund. 1, note (1).

( C. 490. )

THE KING v. ELLIS.

S. C. 3 Keb. 359, 363, 369, and *semb*. 1 Vent. 265.

Restitution granted upon indictment for forcible detainer after traverse and before trial: but not after a plea of 3 years' possession. Style, 186.

AN indictment of forcible detainer was found against Ellis, and he traversed the indictment; and the party that was put out moved for restitution; and the question was, whether or no the Court ought to grant restitution, after a traverse entered, and before trial? And they held that they might, according to the case in Dy. 122(a).

But afterwards the party pleaded, that he had been in possession three years, according to the statute of 31 Eliz. c. 11, whereupon they could grant no restitution.

(a) But see the report in 1 Ventris, 588. *R. v. Marrow*, C. T. Hardw. 174. and *R. v. Harris*, 1 Ld. Ray. 440. S. C. Bac. Ab. Forcible Entry, (F), (G). 1 1 Salk. 260. *R. v. Winter*, 2 Salk. 587, Hawk. ch. 64, § 58.

## NICHOLLS v. COTTERELL.

( C. 491. )

S. C. 3 Keb. 353, 448.

DEBT *Tam quam* for following a trade, not having been apprentice, &c.; and it was questioned upon the statute of 21 Jac. 4, whether this action might be brought \* here? [ \* 378 ] And the Court seemed to incline, that although an information cannot be brought here, but must be in the county according to the statute, yet because an action of debt cannot be brought before the justices of oyer and terminer, nor of the peace, therefore that seemed not to be within the statute; and so it was said it had been formerly adjudged in a case between *Hughes* and *Barnes*(1), 17 Car. 2, in this Court. *Sed advisare vult.* [Jones, 193. Style, 223.]

Whether debt *tam quam* on 5 Eliz. c. 4, lies in the courts at Westminster out of the county in which the offence was committed (a)?

(1) S. C. 1 Vent. 8. 1 Lev. 249.

(a) S. C. cited 2 Lev. 204. *Vid.* — *v. Carter*, ante, p. 64. *Post*, p. 483, 534. *Willes*, 634. 1 Saund. 312 a. notes.

Semb. S. C. *Burdet v. Harris*, 3 Keb. 387.

( C. 492. )

THE condition of an obligation was, that if A. and B., the arbitrators, made an end before the third day of October, then to stand to their award; and if they could not make an end, then if they chose an umpire, and he made his award before the seventh day, then to stand to his award.

Arbitrators may appoint an umpire at any time after the expiration of their own authority, and before the time limited for the umpirage (a).

Upon the pleading it appeared, that the arbitrators chose the umpire upon the third day of October; which was objected against the award of the umpire, because he was chosen by the arbitrators after their power determined, for their authority ended the second day. But it was answered by the Court, though their authority ends the second day, as to making an award, yet not as for chusing the umpire; for the time for that is properly on the third day, when their own power is determined. And, *per Twisden*, if they chuse him the fourth or fifth day, or any time before the seventh day, it is well enough; and he said, if the arbitrators lay down the business, and give it off, yet they may resume it, and make an end when they please, so as it be within their time (b). *Jud' pro quer'.*

Arbitrators who lay down their business may resume it, and make an award within the limited time. *Per Twisden*, J.

(a) Acc. *Adams v. Adams*, 2 Mod. 169. (b) *Vid. Smalles v. Wright*, 3 M. & S. 560-1. *Harding v. Watts*, 15 East, 556. *Beck v. Sargent*, 4 Taunt. 232.

## BRADENEND v. GREENE (a).

( C. 493. )

It was moved in arrest of the second judgment (after the first judgment given *quod computet*) for that it was brought against the defendant as receiver of goods *ad merchandixandum*, which it was said ought not to be; but it ought to be as *bailiff* of goods, and a *receiver* of money, and so are all the precedents: And it was urged, that this is matter of sub-

After judgment *quod computet* in an action of Account, it is no objection in arrest of the second judgment, that defendant

(a) Notwithstanding the difference of names, this case seems to be the same as *Burdet v. Thrule* (or *Threole*), 2 Lev. 126. 3 Keb. 362, 387, 435.

is charged  
as receiver  
(instead of bail-  
iff) of goods *ad*  
*merchandisandum*.

[ \* 379 ]  
Keil. 114.

stance; for a bailiff shall have his charges allowed him, but a receiver shall not; and it is like the case of an action brought in the *Debet* and *detinet*, where it ought to be in the *Detinet* only, which is matter of substance; and though the defendant might well have de\*murred, yet if it be matter of substance, it is time enough now to move in arrest of this second judgment.

But it was urged on the other side, that it is well enough; and that there are precedents. Fitz. Account, 47. 1 Roll. 125, 575. And this is out of the reason of the difference between a bailiff and a receiver; for a receiver *ad merchandizandum* shall have his charges. Co. Ent. 42. And then it is but matter of form, like *Pretii* instead of *Valentiam*, and will not be sufficient to arrest judgment; *ad quod Curia inclinavit. Sed adjournatur (a)*.

(a) Judgment for plaintiff. 3 Keb. 387. *Vid.* 1 Viner, 147-8-9. Co. Lit. 172 c.

( C. 494. )

REN V. BARNES.

*S. C. Rea v. Burnis, (or Barnard), 2 Lev. 124. 3 Keb. 339, 421.*

A covenant to  
pay so much a  
ton is not broken  
by refusing to  
pay a rateable  
sum for odd  
hogsheads.  
*Vid.* 1 Rolle,  
433. N. 25.  
Allen, 9.  
Sty. 12.

COVENANT to pay so much a-tun. The plaintiff assigns for breach, that he delivered ten tun and three hogsheads, and that he had not paid for the three hogsheads. And the Court seemed to incline that he need not, when it was to pay so much by the tun; and remembered a case, where a clerk brought an action upon a contract for so much a-quire for writing, and sued because he was not paid for some odd sheets; and there held, that the defendant need not pay for any sheets under a quire.

Afterwards, in Hilary Term following, the whole Court were of opinion against the plaintiff, that the covenant was not broken by not paying for the odd hogsheads (a).

(a) "*Aliter*, were it to pay *secundum ratam* of so much *per ton*." *S. C.* 2 Lev. 124. And according to 3 Keb. 421, Hale, C. J. said "So much *per ton* must be averred intended among traders to include *pro rata* over or under measure." Leave was given to discontinue on pay-

ment of costs, although the demurrer had been argued. See *Countess of Plymouth v. Throgmorton*, 1 Salk. 65. *S. C.* 3 Mod. 153. *Cutter v. Powell*, 6 Term Rep. 320-6. *Carling v. Long*, 1 Bos. & Pull. 634, and 3 Viner, tit. Apportionment, A. pages 7, 8.

( C. 495. )

RIGHT V. BAYNARD.

*Semb. S. C. Smith v. Baynard, 3 Keb. 388, 417.*

Three closes,  
B. G. & W. are  
contiguous to  
one another; the  
owner of W. is  
bound to main-  
tain the fence  
between W. & G.  
and the owner  
of G. the fence  
between G. &  
B. Cattle stray  
out of B. into G.

THE case was:—A. was seised of B. Acre, F. was seised of G. Acre, and H. was seised of W. Acre, three closes adjoining to one another; and F. was to repair the mound between A. and F., and H. was to repair the mound between F. and H. A. puts his beasts into B. Acre, and they stray into the close of F., for want of repairs between B. Acre and G. Acre, which F. ought to do; and out of the close of F. they stray into W. Acre, the close of H., the mounds being out of repair between F. and H., which H. ought to repair; H. brought an action of trespass, and A. pleaded the special

matter. The question was, whether or no, when the beasts of A. stray into the close of F. for default of repairs by F., and so were no trespassers there, and then they stray into the close of H. for default of repairs by H., this should excuse the trespass of the beasts of A. as it would have done for the beasts of F. And the \*Court seemed to incline that it would not; for though H. was bound to repair the fences, between him and F., and so the beasts of F. would have been excused if they had strayed into his close, yet the prescription that binds him to repair is only personal against F. and his beasts, and not against all beasts that come into his close. *Vide* 10 E. 4, 7. 22 H. 6, 36. And *Twisden* said, if this were a good plea, the right of repairing the fences between F. and H. would be tried between A. and H., but he thought A. must be put to his special action on the case against F. for not repairing, *per quod*, &c. *Sed advisare vult Cur'* (a).

(a) See the same point in Hale's notes to F. N. B. p. 298, 4th edit, where it is said that trespass will not lie in such a case. The defect of the plaintiff's fences can only be pleaded in justification by one whose cattle were lawfully in the adjoining close, as under a licence, right

of common, &c. F. N. B. *ibid.* Regula Placitandi, p. 260. *Anonymous*, 3 Wilson, 126. *Dowston v. Payne*, 2 Hen. Black. 529, 531. See, further, 13 Viner, 162-3. Bac. Ab. Trespass, (G), 48. 2 Brownl. Entries, 469.

from defect of fences, and thence into W. from a like defect: *quare*, whether the [ \* 380 ] owner of W. can treat the cattle as trespassers?

### SIR SAMUEL BARNARDISTON v. SIR WILL. SOAMES.

( C. 496. )

J. C. 6 State Tri. p. 1063, 8vo. edit. 2 Lev. 114. Pollexf. 470. 3 Keb. 365, 369. 339, 419, 428, 439, 442, 586, 664. Hargrave Coll. MSS. in the Brit. Mus. Num. 59 and 339. in Ellis's Catalogue.

THE question was, whether an action on the case was maintainable against the defendant, (sheriff of Suffolk) for making a double return upon a writ to elect one knight of the shire to serve in parliament in the place of Sir ——— who was dead; the plaintiff declaring that he did it falsely and maliciously, *et ed intentione* to put him to great charges, whereby he was damnified 1000*l.* in controverting and maintaining his election before he could sit in the house. 800*l.* being given in damages by a jury of Middlesex, it was moved in arrest of judgment by Mr. *Attorney-General*, that the action was not maintainable: for, if the sheriff had made an undue return, he had his remedy upon the statute of 23 H. 6; and before that statute no action on the case lay at common law, and therefore that statute gave remedy.

Whether an action on the Case lies at common law against the sheriff, for maliciously making a double return upon a writ to elect a member of parliament? See margin, pages 390, 430.

There are two objections lie in my way that are to be removed.

*1st Obj.* An action of the case lies in other cases against the sheriff for a false return, and therefore why not in this?

*Ans.* This differs from other cases of sheriff's returns in many things.

1. The return of the sheriff in other cases is conclusive, but not here.

2. In other cases, if the sheriff be doubtful, (as in a *Fi' fa'* *Post*, p. 430. of the property of the goods,) he may take security of the

party, for whose advantage he makes the return, to save him harmless; but here it is a crime if he do so. Dy. 168.

[ \* 381 ] 3. In other cases the Courts have jurisdiction of the matter whereupon the return is made; but here the Chan<sup>c</sup>ery, into which Court the return is made, have no jurisdiction of the matter.

4. This is not in a case between party and party, as other cases are; but here the government is concerned.

Reasons why no action will lie.

1. From the penning of the statute of 23 H. 6; for that recites, that the party wanted convenient remedy at the common law.

Post, p. 430.

2. Here the sheriff is a judge, and it is not an act merely ministerial; and where a man doth a thing as a judge, no action will lie against him; and the reason is, because a judge ought to have courage and not to be awed with the fear of an action; for that would be a means to make him partial to that party, that was most likely to trouble him with actions. 12 Co. 24, 25. That he is a judge, appears in several acts of judgment in determining the election. 1. Whether the electors have 40s. *per annum*. 2. Whether it be freehold. 3. Whether it be their own without fraud; for it is common to make freeholders by fraudulent conveyances to get voices. 4. Whether they be resident in the county. And these are all matters of difficulty; and 13 & 14 Regis Hil. Rot. 1884. C. B. Mr. *Lechmer's* case, it was held, that the sheriff was a judge, and if so, certainly none hath need of greater courage, and so ought to be free from the fear of actions.

3 Keb. 390.

3. The sheriff in this case is an officer, not subordinate to the Court of Chancery, but to the parliament; and in case of the death of any member, the Chancery cannot issue out a writ to chuse a new member without a warrant from the speaker; neither can that Court meddle with the return, but it is to be decided in parliament; and the parliament seems to take care to free the sheriff from actions; for if he hath made a false return, and they appoint another to be the member, they cause him to mend his return; and when he makes a double return, after the cause is determined, they cause one to be taken off the file; and the house do allow of a double return in difficult cases; and if he do it in plain cases, they fine him: And a double return is like the adjournment of a cause by a judge of assise *propter difficultatem*; and though that doth occasion expenses, yet no action lies against him.

2 Sal. 503.

6 How. Stat. Tri. 1105.

4. In this action the right of elections must come in question, and the defendant must controvert it (at least) in mitigation of damages, and this is to question an officer of parliament out of parliament.

[ \* 382 ]

(1) Post, p. 431.

(2) 2 Sid. 168.

See 6 How. Stat. Tri. 1104.

\* 5. My last reason is *Littleton's* own reason (1); such an action as this was never brought before, and therefore it shall be presumed, that none such will lie: Indeed there was the case of *Nevill and Stroud* in the Common Pleas, *Anno* 1658 (2), but no judgment was given, but it was adjourned into parliament.



*2d Obj.* It being alleged that it was done *falsò et malitiosè*, that will maintain the action.

*Ans.* When the nature of the thing will not bear an action, *Post*, p. 481. the laying *falsò et malitiosè* will never support it; as 4 Co. 28, an action on the case will not lie against a lord of a manor 1 Rol. 108. for not holding a court, whereby a copyholder might be admitted, though it be laid *falsò et malitiosè*. *Ante*, p. 16.

Madison had an annuity during the life of Sir Tho. Wortesly, and J. S. killed him, whereby Madison lost his annuity. Resolved, that no action would lie against him that killed him, though it be laid *falsò et malitiosè*, and to the intent to determine his annuity. And in the case of *Gave v. Gold*, Mich. 23 Car. 1. Rot. 227, where an action was brought for slandering his title *falsò et malitiosè*, where it was for saying, that he himself had a title; resolved that it was not actionable. And so it appears by these cases, where the nature of the thing will not bear an action, *falsò et malitiosè* will not support it; and so he concluded, and prayed that judgment might be arrested. *Post*, C. 579. 3 Keb. 390. *Ante*, p. 224, C. 231. 4 Co. 18.

For the plaintiff it was argued by *Maynard, Jones, and Ofly*.

And they said, here were all things requisite to maintain an action, viz. damage to the party, and prejudice to the public, and a falsity against his oath; and though here be a public prejudice, yet where the party hath a particular damage, he may have an action; as in case of a public nuisance, if any particular party be damnified, he may have his action; and as to the differences taken by Mr. *Attorney-General* between this return and others of the sheriff, they answered;

*Ad primam*:—Though the return of the sheriff be not conclusive, yet the party being damnified, though not so much as if it had been conclusive, it is reason he should have his action.

*Ad tertiam*:—The sheriff is an officer as well to the Court of Chancery as to the parliament, and must make his return thither.

*Ad quartam*:—Though the public be concerned, yet the party may have his action, as in case of a nuisance.

\* And the sheriff is no more a judge in this case than in every return that he makes; for in all of them there must be something to judge of, whether *Fieri facias*, *Extendi*, &c. The statute of 23 H. 6, doth not say there was no remedy before, but only that there wanted convenient remedy, and so gives 100*l.* which was a great sum in those days. [ \* 383 ]

And in this case the right of election cannot come in question; for here the party that brings the action is the person that sits in the house by the vote of the house, and so differs from the case of *Nevill and Stroud*; for there *Nevill* was never admitted into the house, but here the action is with the judgment of parliament; and here the party could not bring an action upon the statute, for the sheriff hath re-

turned him, though he hath returned another with him, and the act is for not returning duly.

And although the like action were never brought before, yet that is not material, if it be agreeable to the rules of law; and *Littleton's* case is upon a statute that seems to be antiquated by reason of its not being put in execution.

And whatever difficulty the sheriff was in about it, that occasioned the making of this return, yet the Judges are to judge upon the record before them; and there it appears not, that he was in any difficulty, but that he did it falsely and maliciously.

*Obly*:—Statutes concerning this matter were observed, viz. 5 R. 2. 12 Ed. 2. 7 H. 4, 15. 23 H. 6.

And the sheriff is not a judge here, but a minister, for when he is to make his return to a Court, he is not a judge: Indeed, in redisseisin he is a judge, but there he makes no return to the Court. 1 Roll. 738. 14 Ed. 4, 1.

The statute of 23 H. 6, being an affirmative law, the party may, if he please, take his remedy at common law. 4 Ed. 4, 12. 12 H. 6, 5. Cro. 64. 4 Inst. 226.

And though the right of election do come in question, yet this Court shall hold plea of it. Rast. Ent. 411.

And though this Court have not original jurisdiction of a matter, yet the party may sue here for damages. As if a man be maliciously summoned in the Spiritual Court for incontinency, &c. 1 Roll. 93, 112. Cro. Car. 320.

Besides, this action is not laid for matters in parliament, but for matters out of parliament; in *Nevill's* case there was no particular damage laid; but here it is said in the declaration, that it was *ed intentione* to put him to expenses.

[ \* 384 ]

*Scroggs pro def*:—If the sheriff may lawfully make a double return, then *falsè et malitiosè* will not maintain the action; and whether he may lawfully do it, or not, is determinable in parliament; and in some cases it may fall out, that he must make a double return, as if the voices were equal.

He took an exception to the record, because it is said at the County-court held *coram vicecomite*, whereas the County-court is held *coram sectatoribus*. But to that it was answered, that in the court at electing parliament-men, the sheriff is judge (3), and so it is held in *Buckley's* case. Flo. 118. *Adjournatur*. Post, Case 500. [p. 387.]

(3) Post, p. 430.

## DE TERM. S. HILARII, 1674.

IN BANCO REGIS.

How v. STYLE.

( C.497. )

R. C. 2 Lev. 126. 3 Keb. 283, 309, 430, 452; and 1 Mod. 107, under the name of *Fountain v. Coke*.

THE case was but this: lessee for years, and J. S. a stranger accepts of a lease and release to uses.

1. The question was, whether or no this old lease were extinct by the acceptance of this lease and release?

\* *Pemberton pro quer*:—That the old lease is not extinguished nor surrendered.

At the common law, before the statute, if lessee for years accepts a lease, though it be shorter than the old lease, yet the old lease is gone by it, and so it is since the statute, if he accepts a lease to his own use; but if he accepts an estate to another's use, his term is saved by the saving in the statute of uses, which was put into the statute to keep the balance even between the *cestuy que use* and the feoffee, that what equity would have given him before the statute he should now be actually seised of in law; and certainly before the statute, if termor had accepted a lease and release to uses, the *cestuy que use* should have had no equity against him for his old term; and if this conveyance had been by fine or feoffment, the term had been saved, as appears by the cases cited in *Lillington's* case, 7 Co. 38, and there is no more equity in one case than the other; and although it hath been objected, that the term is merged by the lease, which is to his own use; yet the lease and release are but one conveyance, and though the release bear date a day or two after the lease, yet it is well known, that generally they are sealed immediately one after another; so that admitting it to be extinguished by the lease, yet the release hath revived it; and Sir Jo. Curson's case was relied upon, which seems to be a stronger case than this. 2 Cro. 643. 4 Leon. 234.

Lessee for years and a stranger accept a lease and release to uses: the former

[ \* 385 ]

lease for years is not thereby surrendered nor extinguished, either for the whole or in part (a).

1 Burr. 79, 80.

Cowp. 704.

1 Term Rep.

741. Bac. Ab. Leases, (R).

Post, G. 542.

Post, C. 543.

2 Rol. 263.

2 Co. 78.

The second doubt was, admitting here be an extinguishment, whether it be for the whole, or only for a moiety, the conveyance being made to the lessee and a stranger; and he held it should be for a moiety; for he said the reason of extinguishment was the accession of the reversion to the term, which was utterly inconsistent with it, so as both could not stand together in the same person, and it was not (as hath been objected) the admitting a power in the lessor to grant; and that appears by this case; *lessee pur 20 ans fait lease pur 10 ans, le darrein lessee accept lease del lessor, n'*

(a) *Vid. Wigston v. Garret*, post, p. 411-2. *Str R. Boye's* case, 1 Vent. 195. *Sugd. Vend. & Purch.* ch. 9, § 2, Dto. 11; p. 365, 5th edit. 3 Prest. Convey. p. 370-1-2.

*est surrender*, and yet there the lessee admits a power in the lessor.

And therefore the extinguishment of the lease being by the accession of the reversion, the *quantum* of that accession will be the measure of the extinguishment.

[ \*386 ] *West pro def'*, argued, that here was an extinguishment by the acceptance of this lease, upon which the release was to enure; for the bargain and sale for a year was to his own use, and then it is not within the saving in the statute of uses, for that is where a man is seised to another's use, there all rights, &c. are saved.

He admitted, if a release had been made to the first lessee to uses upon his old lease, that it had been saved; and he held, that if a bargainee betwixt the lease and release grant a rent charge, and then the release is made to uses, yet this lease shall be in being as to the charge, and no way to avoid it but in equity.

*Hale* seemed to incline, that the term was not extinguished, it being found in the special verdict, that the lease was made *ea intentione* that a release should be made. *Sed adjournatur*. *Post*, Case 505, p. 392.

( C. 498. ) *Semb. S. C. Tooms v. Chandler*, 2 Lev. 116. 3 Keb. 387, 394, 437, 454, 460.

A. makes a lease, with a condition to be void on payment of money: a bond by A. conditioned to perform "all covenants and conditions in the indenture of lease" is forfeited by non-payment. Bac. Ab. Covenant, (A).

A. LEASES land to J. S. upon condition, that if he paid him 3*l.* *per ann.* for five years next ensuing, then the lease to be void; and afterwards gives a bond, with condition to perform all covenants, &c. and conditions in the said indenture of lease; debt being brought upon the bond, the defendant pleaded conditions performed. The plaintiff assigns a breach, that he had not paid the 3*l.* *per annum* according to the condition in the lease. The defendant demurs.

3 Keb. 437.

And the question was, whether or no the condition of the bond was broken by not paying the 3*l.*? And it was argued for the defendant that it was not; because the defendant had not covenanted to pay 3*l.* but had it at his election, either to pay the money, or else let[lose?] the land. But *Hale* seemed to incline that the bond was forfeited; for if the word "conditions" should not relate to that clause of paying the 3*l.* it would be void: and he said, suppose the condition of the bond had been only to perform all conditions in the lease, certainly it must have related to that; and now, when it is for performance of all covenants and conditions, it will be as effectual; for the word "covenants" shall relate to the covenants in the lease, and "conditions" to this condition. *Sed adjournatur* (a).

(a) Judgment for the plaintiff according to *Levinz*; for the defendant according to 3 Keb. 454, 460. If the condition be to perform all covenants or payments, the bond is not forfeited by non-payment, unless the mortgage deed con-

tains a covenant to pay. *Briscoe v. King*, Cro. Jac. 281. *Yelv.* 206. *Saffield v. Baskerville*, 1 Mod. 36-7. Where a conveyance of land by way of mortgage contains no such covenant, payment of the money cannot, it seems, be compelled

by action. *Briscoe v. King*, *supra*. *South Sea Company v. Duncombe*, 2 Barnard. K. B. 50-1. Unless the mortgage be a security for a precedent debt. Co. Lit. 209 a. b. But a pledge of goods will not deprive the lender of his remedy

against the person without a special agreement to that effect. 2 Barnard. *ubi supra*, and S. C. 2 Stra. 919. See, further, *Howel v. Price*, 1 P. Wms. 291-4, and notes *ibid.* by Cox.

## SIR RIC. HARRISON'S CASE.

( C. 499. )

*S. C. Biddulph v. Harrison*, 2 Lev. 127. 3 Keb. 393, 426, 438, 441.

A WRIT of covenant to levy a fine is sued out against five persons, and before the return of the writ one dies, and the fine proceeds; it is error sufficient to reverse the fine against them all; and the case of *Roe* and *Evelin* (a) was cited to be so adjudged; and the reason is, because \* when one of the parties dies, it being in a real action, the whole writ is abated. If one of several conusors of a fine dies before the return of the writ, it is erroneous as to all (c). [ \* 387 ]

And *Wylde* cited a case (b) of a *formedon* for a house and a toft; and because it would not lie for the toft, the whole judgment was reversed, as well for the house as the toft.

(a) S. C. 2 Sid. 54, 92.

(c) 3 Mod. 99. 1 Ld. Raym. 179.

(b) *Semb. Ellis v. Wallis*, 2 Bulstr. 214. 1 Rol. Rep. 2.

Com. Dig. Fine, E. 7. 13 Vinet, 332, 346.

## BARNARDISTON v. SOAMES.

( C. 500. )

Continued from p. 384.

THIS case was argued by Sir *F. Winnington*, the King's Solicitor, for the defendant: and he argued that,

1. This action did not lie at the common law; and for that we must consider,

1. What were the usual returns at the common law, and what alteration is made since by statutes.

Until the time of H. 4, the return was not made by indenture; but the sheriff returned *J. E. electus fuit*, and no more; then came these statutes: 7 H. 4, 15, orders the return to be by indenture; 11 H. 4, 1, ordains a penalty upon the sheriff; 8 H. 6, 7, ordains a farther penalty of imprisonment; 23 H. 6, 15, gives 100*l.* to the party grieved.

Reasons why this action will not lie:

1. It concerns government. *Vide* 4 Inst. 49.

2. The plaintiff cannot say he is damnified any more than the rest of the county, and then by the same reason every man in the county might have an action, which the law will not allow. 5 Co. 72. *Will's* case.

3. The examination of false returns ought to be in parliament, and so ought all the consequences thereof; and the conusance of matters done in parliament belongs not to any other jurisdiction. 3 Ed. 3, 18, 19. Staunf. Pl. Cor. 153. 4 Inst. 15.

4. There was never any such action brought before; and in the case of *Rice Thomas* no mention is made of any action lying at common law. Plow. 121. Dy. 113. Rast. Ent. 146.

Cro. Car. 181.  
Post, C. 619.

And the case of Sir *Jo. Elliott*, that judgment was reversed in parliament.

*Obj.* Here is loss of wages.

*Ans.* The wages is for service; and it shall be presumed to be as much benefit to him not to serve and have no wages, as to serve and have wages; and as to the case of *Nevil* and *Stroud* no judgment was ever given.

*Ante*, p. 382.

[ \* 388 ]

\* 5. The sheriff is a judge in this case, Hughes's Abr. 1316. and no action will lie against a judge, 12 Co. 14. And so prayed the arrest of judgment.

*Maynard pro quer'*:—Without question this action would have lain at the common law; for here is a wrong done, a particular person hath damage, and that by a sworn officer, and that falsely and maliciously.

And Hob. 78, an action lay upon this statute of 23, though it was no parliament, no act passing.

Misdemeanors &c. that are done in parliament are examinable only there; but this is for a matter out of parliament, for a return into Chancery.

*Obj.* Such an action was never brought before.

*Ans.* Actions of the case are not in the register, but are formed *pro re nata*; and an action of the case hath been brought against a justice of peace for making out a false warrant without any ground.

An action lies for intercepting the return to a parliamentary writ, and substituting another. *Semble per Hale*, C. J.

*Hale*, C. J. inclined, that the action would lie; for if so be another person had intercepted this return, and taken off the right indenture and affixed another to it, would not an action have lain against him?

And though the sheriff be punishable in parliament, yet it doth not from thence follow, that an action will not lie; for so he may be amerced for a false return here, and yet an action will lie against him.

Persons, duly elected to serve in parliament, are punishable for refusing. *Per Hale*, C. J.

3 Keb. 430.

The person elected is bound to serve, and punishable if he do not, if he be an inhabitant and freeholder.

And admitting it were no profit to him to serve, yet it is matter of reputation.

The statute inflicts the penalty, whether the party hath damage or not, and that shall not take away his action where he hath damage.

*Post*, p. 390.

In this case the Court doth not forestal nor anticipate the judgment of parliament, but follows the determination of it.

*Twisden*:—Suppose a man were maintained in parliament, would not an appeal lie against him? It was answered, that was a tender point.

*Rainsford*:—This is a new case, and let us advise with our brethren.

*Wylde*:—It is so plain a case that the action lies, that it is not worth while to trouble them with it.

But, at the instance of *Rainsford*, *Cur' advisare vult*. *Post*, Case 503. [p. 390.]



— v. SIR WILLIAM SCROGGS AND J. S.

( C. 501. )

*S. C. Deakins (or Hamilton) v. Scroggs and another*, 2 Lev. 129. 2 Mod. 296.  
3 Keb. 424, 439, 440.

**ACTION** of battery against Serjeant Scroggs and another: the Serjeant pleaded his privilege, that he ought to be sued no where but in the Common Pleas: and the question was, whether or no a Serjeant had any such privilege? And these authorities were cited that he had, 10 Ed. 4, 4 & 5. 14 H. 4, 11. 20 H. 6, 32. 35 H. 6, 3. 22 H. 6, 53. 34 H. 6, 29. Cro. Car. 84. The next day, *Hale*, C. J. being present, they awarded a *Respondeas ouster*: For, 1. They said, if a Serjeant had any privilege, the joining another with him in *Custodia Mareschalli* had taken it away, for then the privilege is first attached in this Court (a); but to that a difference was taken, where the action is such as the defendant must necessarily be joined, there perhaps the common law shall be preferred; but otherwise if the party might have severed them in his action; and in that there may be a difference between the privilege of a person in Chancery, where none but a privileged person can be sued; for if an action be brought jointly against such a person, and another in the King's Bench or Common Pleas, there he shall not have his privilege, for then the plaintiff's action would be lost.

A serjeant sued jointly with another in the K. B. cannot plead his privilege: and *comb.* he has no privilege against the K. B., although he has against an inferior court. 1 Rol. 580.

2 Rol. 274.

1 Brownl. 37.

But the Court held, that a Serjeant had no such privilege against this Court; though he shall against an inferior Court (b), and so shall his servant, according to Cro. Car. 84; because a Serjeant is not upon any account bound to attend there, but here he may; as if the Court should assign him to be counsel, he ought to attend; and if he refuse, *per Hale*, C. J., we would not hear him, nay, we would make bold to commit him; and though an officer be suable by bill in his own Court, yet his servant is suable by original. Cro. Car. 84.

A serjeant, assigned to be of counsel by the court of K. B., cannot refuse. Acc. 11 Ed. 4, 3, cited Com. Dig. Ley, D. 1, 3. 2 Mod. 298. Covenous joinder of co-defendant shall not exclude the privilege. *Per Twisden*, J.

*Twisden*:—Where another is joined, he shall lose his privilege; but if upon examination the joining appears to be by covin, he shall have his privilege.

*Per Curiam: Respondeas Ouster.*

(a) *Branthwaite v. Backerby*, 2 Salk. 544. *Townsend v. Duppa*, 1 Stran. 610.

(b) Upon error in the Exchequer Chamber, North, C. J. appears to have thought that a Serjeant had a privilege to be sued in C. P. only. 2 Mod. 298. Acc. *Serjeant Mead's* case cited 2 Wil-

son, 232. See, further, 3 Salk. 281-2. Com. Dig. Ley, D. 3. *Baker v. Swindon*, 1 Ld. Raym. 399. *Swain v. Girdler*, Barnes, 371, Quarto edit. Pleader's Assistant, 305. 17 Viner, 516. See observations on this case in North's Life of Ld. Guilford, 1 Vol. p. 128, 2d edit.

*S. C. Rex (or Emerton) v. Sir R. Viner*, 2 Lev. 128. 3 Keb. 434, 447, 470, 504. Bac. Abr. *Habeas Corpus*, (B), 12.

( C. 502. )

**MEMORANDUM**, that this Term a *Habeas corpus* was directed to Sir Robert Viner, then Lord Mayor of London, to bring in the body of Bridget Hyde, who was his wife's

Security taken from the detaining party upon *Habeas corpus*. 3 Mod. 164.

[ \* 390 ] daughter, upon the suggestion of Mr. John Em<sup>m</sup>merton, who pretended, he was married to her before the death of her mother, which marriage was under litigation in the Spiritual Court; it appearing to the Court, that she had been under some restraint, the Court ordered my Lord Mayor to give security for her safe custody; and that she should not marry any body else till the decision of the suit in the Ecclesiastical Court, with his privity, consent, or procurement.

A return to a *pluries hab. corp.* denying the detention at the time of or since the service of the *pluries* writ, is bad.

*Memorandum.*—In this case the Lord Mayor made no return till the *pluries*, and then returned, that she was not then in his custody, nor any time since the coming of that writ to his hand; which the Court held to be an insufficient return, because he did not answer to the time of the coming of the first *Habeas corpus*; and being insufficient, it was as no return; and thereupon the Court gave order to bring in the body, or else an attachment to go against him; and thereupon he brought her in. [S. C. *post*, p. 401, 522.]

( C. 503. )

SIR SAMUEL BARNARDISTON v. SOAMES.

Continued from p. 388.

Case lies against the sheriff at common law for making a double return to a parliamentary writ *falsely, maliciously*, and with intent to put the plaintiff to expense. *Dissent. Rainsford, J. Vid. post*, p. 430, and notes, *ibid*.

THE last day of this Term but one, the Court being pressed by the plaintiff for their judgment, all but *Rainsford* gave their opinions for the plaintiff; for as much as the jury have found it to be done *falsè et malitiosè et eà intentione* to charge him with expenses; but they did declare, that if the sheriff did make a double return cautelously, they were far from thinking that it would bear an action; and compared it to the case of an indictment, for which barely of itself no action will lie; but if it be found to be done *falsè et malitiosè*, it is every day's experience that it will lie; and this action is for a matter antecedaneous to any proceedings in parliament (a); and besides, here is nothing done to thwart any thing done by the parliament, but it is concurrent with them; and therefore *Hule, Twisden, and Wylde*, gave judgment for the plaintiff.

1 Inst. 81.  
*Post*, p. 431.

*Rainsford* said, it being a matter concerning the parliament ought to be determined there, and no where else; and besides, if any action would have lain, probably it would have been brought before this time, parliaments having been and elections for these many years; and so he concluded for the defendant; but judgment was given for the plaintiff. *Vide post*, Case 579, this judgment reversed by a writ of error. [*Post*, p. 430.]

(a) *Ashby v. White*, 1 Salk. 21. 6 How. Stat. Tri. 1110. 2 Salk. 502-3. *Shaftesbury's case*, *post*, p. 455.

## DE TERM. PASCHÆ, 1675.

IN BANCO REGIS.

## SIR THOMAS LITTLETON'S CASE.

( C. 504. )

S. C. 1 Vent. 270. 3 Keb. 451, under the name of *Gibson v. Thompson*.

SIR THOMAS LITTLETON, by the king's order, bought victuals and provision to victual the navy; afterwards he sold part of it to the French fleet, and he also furnished the army at Blackheath, and what was left he sold to others whom he could; the question was, upon a trial at the bar, whether or no this would make him a buyer and seller within any of the statutes of bankruptcy? And it was held by the whole Court, that it would not.

One who contracts with the king to victual the navy, is not a trader within the bankrupt laws, although he sells the surplus. Acc. *Newton v. Trigg*, 1 Salk. 110. 2 Black. Comm. 476-7. Com. Dig. Bankrupt, B.

*Hale*, Ch. J.—Here are three things considerable, 1. He buys of several people provisions, by the king's order, to victual his navy; this will not make him within the statute, because this was a buying for a particular end.

2. As neither will his selling it to the French navy; for they were at that time under the government of our admiral, and so as it were a part of our fleet: and so, 3. Neither will his selling it to the army at Blackheath, or to any else, for it being but to dispose of that which he had at first bought for a particular use, and being as it were but one act; and he said, if this shall bring a man within the statute of bankrupts, then every purveyor for the king's household, or the sutlers for the army, nay, every steward \* of a college or inns of Court (1), and schoolmasters that take tablers, &c.

[ \* 392 ]  
(1) *Skin. 292.*

## HOWE v. STYLE.

( C. 505. )

Continued from p. 386.

THIS case being now moved, the Court inclined, that the term was not extinguished, but was saved by the statute of uses, the lease and release being as it were but one conveyance; and *Hale* put this case (1); a man by way of mortgage leases lands for years, and covenants to make farther assurance; the lessee redemises, rendering rent, and for non-payment of such sums to re-enter; afterwards the lessor, in pursuance to his covenant, levies a fine to the lessee; and resolved, that his term was not extinguished; but the argument was adjourned; *et postea fuit adjudge q' le terme ne fuit extinct, come fuit dit al moy per Pemberton*.

*Vid. margin, p. 384.*  
(1) *Heal v. Seckham*, cited 3 Keb. 432, 452, 538. *Post*, p. 412.

## BROWNE v. COLLINS.

( C. 506. )

S. C. 2 Lev. 110. 1 Ventr. 292. 3 Kebl. 462, 530.

AN action of debt was brought against an executor of an executor, upon a surmise of a *devastavit* committed by the first

Debt lies not against the executor of an

executor, upon a *devastavit* by the first executor.

1 Saund. 216.  
2 Rol. 298.

executor; and it was held by the Court, that it would not lie, because it was founded upon a personal tort of the first executor, which dies *cum personâ* (a); but it was held, that an action of debt would lie against the executor that wastes, upon surmise only of a *devastavit*, without any return by the sheriff. 1 Roll. 603. *cont.* 1 Saund. 216. [*Vid. post*, p. 458.]

(a) *Ante*, p. 313, C. 386. But see *Hammond v. Gatcliffe*, Andr. 252. 11 3 Lev. 133. *Garth v. Cotton*, 3 Atk. Viner, 310; and note by Serjeant Williams, to *Wheatly v. Lane*, 1 Saund. 219 c. *Berwick v. Andrews*, 2 Ld. Raym. 971.

( C. 507. )

DRUE *v.* BAYLYE.—*Mich.* 25 *Car.* 2. *Rot.* 178.

*S. C.* 2 Lev. 100. 1 Ventr. 275. 3 Keb. 298, 427, 463, 495, 549.

*Vid. margin*, p. 402.

[ \* 393 ]

*Post*, p. 404.

AN administrator possessed of a term makes a lease for years of part of it, reserving a rent, and makes his executor, and dies; the executor brings debt for this rent; the question was, whether or no it would lie, because the reversionary part of the term did not come to the executor of the administrator, but did belong to the administrator *de bonis non* of the first testator? But the Court did incline, that it would lie upon the contract, though he could not distrain for it; for the administrator *de bonis non* \* could not have it, because he came in paramount the reservation, and compared it to the case of baron and feme; 1 Inst. 46 b. 1 Roll. 344; or like the case of jointenants, if one leases reserving a rent, his companion shall not have it, because he comes in paramount the reservation.

( C. 508. )

*S. C.* *Ashton v. Jennings*, 2 Lev. 133. 3 Keb. 462.

A battery cannot be justified in order to maintain a right of precedence at a funeral. 2 Hawk. P. C. c. 4, § 8.

It was held in an action of battery, that it was no good justification for a justice of peace's wife, that the plaintiff being a doctor of divinity's wife did go before her at a funeral, and she did *molliter manus imponere*, to pull her back into her place; for as *Wylde* said, if that should be held a good plea, at every funeral there would be nothing but scuffling for places.

( C. 509. )

An indictment lies upon prohibitory words in a statute, although it also limits a penalty and a particular manner of recovering it.

*Ante*, p. 100, 327. *Post*, p. 444. 1 Burr. 543. 4 Term Rep. 205.

A DIFFERENCE was taken upon *Castell's* case, 2 Cro. 644, that if so be a statute hath prohibitory words, though it limit a penalty with the manner for the recovery of it, the party is subject to an indictment.

But if there be no prohibitory words, but it runs, that if the party doth such a thing, then he should be punished in such a manner, there no indictment can be for such offence as it was; and this difference was taken upon an indictment for going with more than five horses in his waggon, against the late statute.

BOLTON v. CANNON.—*Hil.* 26 & 27. Rot. 1051.

(C. 510.)

See, *ante*, p. 336. S. C. 1 Vent. 271. Pollexf. 125. 3 Keb. 446, 466, 493.

ADMITTING that an executor cannot wave his term; yet when he lets it alone, and pleads, that the rent was more than the value of the land, it was made a question, whether or no he should be charged in the *Debet* and *detinet*.

An executor cannot wave a term of years; but if he lets it alone, and the rent exceeds the value of the land, he is chargeable in the *detinet* only for rent.

The case was, that an action of debt in the *Debet* and *detinet* was brought against an executor of a lessee for years; and he pleads, that before the action brought he had fully administered, and that his term was of less value than the rent, and that he had offered to surrender.

The plaintiff replied, that there were arrears of rent due at the time when he offered to surrender.

*Qu.* Whether, if a rent be of greater value than the land, the executor shall be charged in the *Debet* and *detinet*? And it seemed that he shall not, but shall be charged in the *detinet* only, for there the judgment will be *de bonis testatoris* only (a).

[ \* 394 ]  
2 Rol. Rep. 131.

And it seemed *per Cur'*, that an executor could not wave his term; for if he had assets, he should be charged *de bonis testatoris*, and the profits of the lands are assets to the rent, and only the surplus above the rent is assets to other debts.

*Alwyn*, 34, 76.

*Ante*, p. 337.

(a) See *Billingham v. Speerman*, 1 S. C. 2 Moo. 94. And *ante*, p. 171-2, Salk. 297. *Buckley v. Pirk*, *Ib.* 317. 261-2. Serjeant Williams' note on *Jevens v. Harridge*, 1 Saund. 1. *Wentw. on Ex.* p. 147-8, &c. (ed. 1763). *Remnant v. Brembridge*, 8 Taunt. 191.

## DE TERM. S. TRINITATIS, 1675.

IN BANCO REGIS.

Semb. S. C. *Stafford v. Rowe*, 3 Keb. 444, 472.

(C. 511.)

AN action of trespass was brought *quod domum fregit et bona asportavit*; and as to the *domum fregit*, the defendant was found not guilty, but to the taking away of the goods, guilty, and damages assessed to 15s. The question was, whether he should have any more costs than damages, in as much as being found not guilty to the *domum fregit*, it is now no more than if he had brought an action of trover for the goods, and that had not been within the statute; and a precedent was cited in the Common Pleas, where it was held, that the plaintiff should have his full costs; *sed adv. vult Cur'*.

In trespass *quod domum fregit et bona asportavit*, there is a verdict of not guilty as to the *domum fregit*, and guilty as to the *asportavit*: plaintiff shall have full costs.

And so it was held here afterwards (a).

(a) *Vid.* 2 Vent. 180. 1 H. Black. 291. 1 Taunt. 357. 3 Wils. 331.

( C. 512. )

RIDLEY v. POWNELL.—*Trin.* 26. *Rot.* 1052.

S. C. 2 Lev. 136. Pollexf. 134. 3 Keb. 472, 506, 540, 560.

The office of register may be

[ \* 395 ]

granted for 3 lives, whether the bishopric be an old or a new one, if it was usually so granted before the stat. 1 Eliz. c. 19.

ACTION upon the case for disturbance in his office. The bishop of Bristol granted the office of register to A. for three lives; the question was, whether or no the \* successors were bound by this grant, that bishopric being erected within the time of memory.

And it was said by *Hale*, that the granting offices is not restrained by the words of 1 Eliz. but by construction; for it is no part of the possessions of the bishopric, nor can any rent be reserved out of it; but it hath always been taken to be within the meaning of it; before that statute the bishop, with the consent of the dean and chapter, might, if he had pleased, have granted it in fee; and for that there had been no difference, whether the bishopric had been a new or an old one.

But since the statute of 1 Eliz. the Judges, in the exposition of that statute, have always had a respect to what hath formerly been done, so that if such an office before that statute had been usually granted for one or two lives, they have allowed it to be grantable so still; or if before that statute it were usually granted in reversion, they do allow such a grant to be good still; and it is not material to prescribe for such a grant; but if it hath usually been done, it is sufficient; and that as well in the case of a new bishopric as of an old one.

Bridgm. 31.

Now here it is found in the special verdict, that the said office *separalibus temporibus* was granted for three lives; but it doth not appear that it was ever granted so before the statute of 1 Eliz., and that makes the difficulty of the case. *Vide* 10 Co. 60. Moor, 38. Cro. Car. 49, 259, 279, 555. *Et adjournatur.*

*Note*, that in all cases the Judges have had a respect to the manner of granting them before the statute, usually both in respect of time and fees. [W. Jo. 311.] (a).

(a) A *venire de novo* was awarded. 2 Jones v. Beau, 4 Mod. 16. *Trelawney v. Bishop of Winchester*, 1 Burr. 219. Lev. 138. See, further, Bac. Abr. Offices, (D). Gibs. Codex, tit. xxxi. ch. 3. *Threadneedle v. Linum*, ante, p. 181.

( C. 513. )

BARKESDALE v. DOWDSWELL.—*Pasch.* 27. *Rot.* 18.S. C. *Baxter v. Dowdswell*, 2 Lev. 138. 3 Keb. 475, 486, 498.

LAND of the nature of borough English is granted to A. and his heirs for three lives; A. dies. The question was, whether the eldest or the youngest son shall have it? And the Court all inclined, that the youngest should have it, for he is in by descent. *Vide* 1 Inst. 110 b.

*Quesb.* an executor cannot (at common law) be the special occu-

And he is not in as a person designed by description, for then an executor might have it; but for that it is held, that if it be granted to a man and his executors, the executor shall



not have it; and *Hale* said, the reason of that was, because the law will not suffer a freehold to run out of its channel (a). *Adjournatur*. [S. C. post, p. 399.]

part of an estate per enter vie.

(a) There are conflicting opinions upon this point. See the cases cited in Bac. Abr. Estate for Life, (B). 3. Com. Dig. Estates, F. 1. 1 Cruise's Dig. 125-6, 2d edit. *St. John's College v. Fleming*, 2 Vern. 320. *Dux Devon v. Kinton*, Id. 719; and 2 P. Will. 381. *Westfaling v. Westfaling*, 3 Atkins, 466. *Hassel v. Gouthwaite*, Willes, 505. *Atkinson v. Baker*, 4 Term Rep. 229. Hargr. Co. Lit. 41 b, note (4). *Ripley v. Waterworth*, 7 Ves. 440. *Campbell v. Sandys*, 1 Scho. & Lefr. 238-9.

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WEBB v. BATCHELER.—*Trin. 26. Rot. 904.*

( C. 514. )

S. C. 1 Ventr. 273. 2 Lev. 139. 3 Keb. 476, 507.

TRESPASS for taking three cows. Upon a special verdict the case was, that the plaintiff, being a parson, was warned to send his team to the highways; and neglecting to do it, upon complaint made to a justice of peace, there was a warrant granted to distrain upon him, which was executed by the defendant as officer. Two questions were made, 1. Whether or no the parsons be chargeable to the repairs of highways? And for that it was held *per Cur'*, that they are chargeable to all public charges, as watch and ward; as was held in Dr. *Hawley's* case; and so likewise to constables' rates, &c. And they said, that was the opinion of all the Judges of England in 8 Car. (a).

Clergymen are chargeable to the repair of highways. An officer is not subject to an action for executing the irregular process of a justice of the peace, if it be in a matter within his jurisdiction. Cited in *Gwynne v. Poole*, 2 Lutw. 1562-3.

The second question was, whether or no the parson, having no notice to appear before the justice of peace to make his excuse, be liable to be charged?

But for that the Court inclined, that admitting he should have had notice, yet here the defendant, being but an officer, shall not be subject to an action for executing a process of a justice of peace, by reason of any irregularity in the justice's proceedings, if it be a matter whereof he hath jurisdiction (b). And *Hale* said, this is not like the case in Cro. Car. 395, where a justice makes a warrant to levy a rate in a parish that is not chargeable. For there, *come semble al moy*, the party upon whom the distress is taken is not at all chargeable; but here the party is chargeable, though the justice hath erroneously proceeded. [S. C. post, p. 407, 457, 488.]

2 Rol. 560.

(a) See ante, p. 359, C. 460. Post, p. 457, 490-1. *Rex v. Just. of Bucks.* 1 Barn. & Cressw. 485. S. C. 2 Dowl. & Ry. 689. On the exemptions of the Clergy generally, see Gibb. Codex, tit. I. ch. 5, in notes. 3 Burn's Ecc. Law, by Tyrwhitt, p. 204-5.

land v. Cocke, ante, p. 317. *Weld v. Wiggett*, p. 320. *Higginson v. Martin*, p. 322. *Bennett v. Thorne*, p. 356. *Bradbourne's case*, p. 435. 20 Viner, 494. Com. Dig. Imprisonment, H. 8, 9. *Hill v. Bateman*, 1 Stra. 710. *Brown v. Compton*, 8 Term Rep. 424. *Str T. Beaumont's case*, post, p. 491-2.

(b) Post, p. 407, 490-1. S. C. And see *Squib v. Holt*, ante, p. 193. *Har-*

## MAYO v. COMBES.

( C. 515. )

S. C. 3 Keb. 477. On error, Pollexf. 164.

THE baron being gone beyond sea, the feme levies a fine of her lands; the baron returns and enters into part. The

A feme covert levies a fine of her own lands,

the entry of her husband into part will avoid the whole (a).

question was, whether this had avoided the whole fine? And held that it had; for what act soever he doth in disaffirmance of the fine shall avoid it. [10 Co. 43. 2 Co. 56.]

(a) 5 Cruise Dig. 133, 2d edit. Co. Lit. 46 a.

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( C. 516. )

MOTERTON v. JOLLIN.

S. C. 1 Vent. 271. 2 Lev. 142. 3 Keb. 477, 493.

Lessee covenants that lessor shall cut 20 of the best trees on the land during the term: it is a breach for the lessee to cut any even for house-bote (a).

LESSEE covenants with the lessor, that he shall cut twenty of the best trees growing upon the land demised at any time during the term, and afterwards the lessee cuts five trees; and an action of covenant being brought, he pleads that he cut those five trees for house-bote: and the plaintiff demurred.

Hob. 174.

And it was held by the Court, that he had broken his covenant, although the trees were taken for house-bote; for it was his own fault that he would make such a bargain; and the lessor being to make his election, he had hindered him of it by cutting these five trees; for, for all that appears, these were the best. Yelv. 76. But however, destroying his election, he had broke his covenant; for those should be said the best which the plaintiff would esteem so; like to the case of *Optimum animal* in an heriot, the lord may take which he will.

Hob. 60. Cro. Eliz. 32.

5 Co. 25.

And Sir Thomas Palmer's case being cited *per Saunders pro def'*, Hale said this differed from that; for this was to take twenty of the best trees, as he should elect within eleven years. *Jud' pro quer'*.

(a) "At least without a request to the grantee to make his election." S. C. 2 Lev. 142. Com. Dig. Grant, F. Rackham v. Jesup, 3 Wilson, 336.

(C. 516b.)

Semb. S. C. Bingly v. Warcop, 3 Keb. 480.

Goods seized under an execution after bankruptcy, and before commission issued, pass to the assignees.

If the sheriff take the goods of a bankrupt in execution, though it be before the commission taken out; yet it seems that the commissioners may sell them, if it be executed after the party became a bankrupt. [Cro. Car. 148.] (a).

(a) Com. Dig. Bankrupt, D. 20. Thomas v. Desanges, 2 Barn. & Ald. 586. Cooper v. Chitty, 1 Burr. 20. Smith v. Milles, 1 Term Rep. 475.

( C. 517. )

THE KING v. PARSONS.

S. C. 3 Keb. 485, 505.

ERROR to reverse a judgment upon an indictment.

Parsons was indicted for seditious words uttered by him in a sermon; and the question was, whether or no justices of oyer and terminer may try the party the same day that the indictment is found. *Vide* Style, 28, that they cannot. Cro. Car. 448. *Curia advisare vult*. [S. C. post, p. 406.]

## THE KING v. LESTRANGE.

( C. 518. )

S. C. 3 Keb. 486.

ERROR to reverse a judgment given in the King's Bench in Ireland.

Forgery of a recognizance is not within 5 Eliz. c. 14, unless it have the seal of the conusor.

Lestrange was indicted upon the statute of 11 Eliz. in Ireland (which is the same *verbatim* as our statute of 5 Eliz.) for forging a recognizance. And it was held *per Cur'*, according to 3 Inst. 171, that unless it be a recognizance in the nature of a statute-staple, it is not within the statute, because they have not the seal of the conusor to them; and besides, there was no *capiatur* nor *committitur* entered upon the roll; and for these errors judgment was reversed: but the Court made him give bail to appear to a new indictment in Ireland, for this was an offence punishable at common law.

2 Stra. 1144.

## LENTHALL v. LENTHALL.

( C. 519. )

S. C. 2 Lev. 109, 132. 3 Keb. 487.

THE defendant was marshal of the King's Bench, successor to Sir Jo. Lenthall; a prisoner, in execution at the suit of the plaintiff in Sir Jo. Lenthall's time, was by him voluntarily permitted to escape, and after the prisoner *revertit* to the prison, and escaped in the time of the defendant; and the question was, whether he was in execution for the plaintiff in the defendant's time, so that he might have this action? And held that he might; for the plaintiff has an interest in the body of the prisoner as a pledge for his debt; and it shall not be in the power of a gaoler to defeat him of it; for perhaps he may not be responsible to give the party satisfaction. [1 Roll. 902. Hob. 202.] *Jud' pro quer'*. The party may have either a *Sci' fa'* or a *Ca' sa' (a)*.

A prisoner in the Marshalsea returned to prison after a voluntary escape, and again escaped after the succession of a new marshal: the new marshal was held liable for the second escape.

(a) See *James v. Peirce*, 2 Lev. 132. 435; and see *Basset v. Salter*, *ante*, p. Buller's Ni. Pri. 69. *Grant v. Southers*, 213. 6 Mod. 183. *Crompton v. Ward*, 1 Stra.

CARTRIGHT v. PINGREE.—*Hil. 26 & 27. Rot. 184.*

( C. 520. )

S. C. 1 Vent. 272. 3 Keb. 466, 488.

THE defendant was lessee for life of the dean and chapter of Lincoln, and he leases to the plaintiff for twenty-one years, if he should live so long; the plaintiff assigns the said term to the defendant, rendering 10*l.* *per annum*; and then the defendant surrendered his interest to the dean and chapter. The question was, whether an ac<sup>t</sup>ion of debt would lie upon this contract for the rent, by reason the plaintiff had assigned his whole term to the defendant, who had a reversion for life in him, and so the term was extinct; and here was no deed in the case?

Lessee for years assigns to his lessor reserving rent without deed: the reservation is in the [ \* 399 ] nature of rent, and recoverable by action of debt; but not by distress.

And it was held *per Curiam*, that the action well lay upon the contract; as where a lessee for years assigns his whole term to a stranger, reserving a rent; this is good by way of

1 Inst. 47 a.  
*Ante*, C. 489.

contract; though he hath no reversion in him, and so cannot distrain for it. 2 Cro. 487. 45 Ed. 3, 8. And it shall still be of the nature of a rent; as if part of the land be evicted, it shall be apportioned, &c. and it is not like a contract to pay money at several days, where an action of debt will not lie before the last day, but here it will as it becomes due. *Jud' pro quer' (a)*.

(a) See *Smith v. Mapleback*, 1 Term Taunt. 593. *Floyd v. Langfield*, *ante*, p. Rep. 441. *Parmenter v. Webber*, 8 218, and the authorities there cited.

(C. 521.)

BARKESDALE v. DOWDESWELL.

Continued from p. 395.

Land of the nature of borough-English is granted to A. and his heirs for three lives: on the death of A. his younger son shall have it.

Cro. Eliz. 901.  
 Moor, 1664.  
*Ante*, p. 395.

Now *Finch* argued this case for the younger brother; and he said, in this case the question is no more but whether the heir in this case is to take by way of descent, or by way of purchase? And he held, that he must take by way of descent; for if he takes by way of purchase, it must be either by way of remainder, and that cannot be, for then the father could not dispose of it, which it is very clear he may do; or 2dly, it must be by way of designation of a person by way of occupancy, and that he cannot do; for then an executor would take, for that is a good name of designation; and that is held in *Yelv. 9*, *Salter's* case, that if a rent be granted to A. his executors, &c. during the life of B. the executor shall not have it; and formerly such an estate hath been held for a fee simple; as *Bracton*, 27. *Dy. 253*; and in *Seymor's* case, 10 Co. it is called an estate of freehold descendible; and though the heir in this case shall not have his age, nor be charged with debts, yet it doth not follow but that he is in by descent; for so in *Shelley's* case, the uncle shall not have his age, nor shall his descent take away an entry; and yet it is there held that he was in by descent.

*Saunders pro def'* said, that there be many books that say the heir "shall have it," and others that "it shall come to him," but none that it shall descend to him, but *Seymor's* case; and he cited 2 Roll. 151. *Dy. 328*. Cro. Eliz. 804. 1 Bulst. 137.

The Court inclined for the younger son. *Et adjournatur*.

[ \* 400 ]

\* *Et postea* Serjeant *Maynard* argued *pro def'*, (the elder brother) and cited *Plo. 28*. 5 Ed. 4, 8. 2 Ed. 3, 12. 9 Ed. 3, 27. 35 Ed. 3, 22. 17 Ed. 3, 48. 1 Co. *Chudleigh's* case; *sed nient miens judgment fuit done pro quer. le puisne fitz, per tot. Cur' (a)*.

(a) Acc. *Clements v. Scudamore*, 2 1 Fox and Smith's Irish Term Rep. p. Ld. Raym. 1028. 2 Vern. 226. Bac. Ab. 3, 4. Borough English; and see *Long v. Myles*,

ROE v. WILLIAMSON.—*Hil. 25 & 26. Rot. 719.*

( C. 522. )

S. C. 2 Lev. 140. 3 Keb. 490.

A LESSEE for three years demises to B. for five years, who brings an ejectment, and declares against the first lessor for five years; and upon the evidence it appeared, that he had right but for three years, because A. that leased to him had no more; and the Court were of opinion, that the plaintiff could have no judgment. Lat. 93.

The demise laid in the declaration in ejectment must not exceed the term which the lessor of the plaintiff in fact possesses (a).

(a) *See* *vid. cont.* Buller's Ni. Pri. 106. *Doe v. Porter*, 3 Term Rep. 13.HUTCHESON v. THOMAS.—*Mic. 26. Rot. 591.*

( C. 523. )

S. C. 2 Lev. 141. 3 Keb. 426, 491.

IN an action of debt *tam quam* upon a penal statute, the defendant pleaded, that there was another depending for the same thing; and because he did not say, that the other was depending before this was brought, it was held to be no plea; for perhaps after this was brought, the same term the defendant might procure some fraud covenantously to prosecute another (a).

In a penal action, the plea of another pending must shew that it was pending before the commencement of the present.

(a) Better reported in Levinz. See Burr. 1423. S. C. 1 W. Black. 437. 14 also *Jackson v. Gislign*, 2 Stra. 1169. Viner, 414-5. Bull. Ni. Pri. 197. *Combe v. Pitt*, 3

## MAYOR AND COMMONALTY OF LONDON v. BRE.

( C. 524. )

S. C. *Mayor &c. of London v. Gorrey*, 2 Lev. 142. 3 Keb. 480, 491.

AN action was brought by them for a duty called shewage, and they declared upon the grant of Ed. the 4th, by letters patent; the defendant demanded *oyer* of the letters patent, and the plaintiffs in their replication demurred, *quia placitum prædictum minus sufficiens*, &c. and it was held by the Court, that the replication was nought, for he says, *placitum prædictum est minus*, &c. and there was no plea pleaded; for the demanding of *oyer* is no plea, and therefore a repleader was awarded (a); and it was held, that after an imparlance, *oyer* cannot be demanded (b).

Demand of *oyer* is no plea, and therefore a demurrer thereto *quia placitum prædictum minus sufficiens*, &c. was held bad, and a repleader awarded. 2 Rol. 160. No *oyer* after imparlance.

(a) Judgment for the defendant and no repleader, according to Levinz. According to 3 Keb. 491, the plaintiffs should pray "judgment, if he shall have *oyer*, which had been a *sine auditu respondeas ouster*: and a repleader was awarded giving *oyer*." In an Anonymous case, 3 Salk. 119, the demand is said to be "a kind of plea." In Bac. Ab. 4 vol. p. 114, 5th edit. Pleas and Pleading (I), the principal case is erroneously cited to shew that there can be no demurrer to a demand of *oyer*; whereas the plaintiffs may demur or counterplead to it, [*Longueville v. Thistleworth*, 2 Ld. Ray. 970. 1 Saund. 9 b. note (1).]

according as the objection to the demand appears on the record, or depends on extrinsic matter. See Stephen on the Princip. of Pleading, p. 94. Note: *Oyer* of letters patent is not granted at this day. *R. v. Amery*, 1 Term Rep. 150.

(b) i. e. where the imparlance is to another term, and not to another day in the same term. *R. v. Amery*, 1 Term Rep. 149. 2 Saund. 2, note (2). Tidd's Prac. ch. xxii. And see 2 Lev. 197. 2 Show. 310. 6 Mod. 233. 12 Mod. 99. 2 Ld. Ray. 970, and the precedents of *oyer* after imparlance in the K. B. 1 Saund. 3, 289. Com. Dig. Pleader, P.

(C. 525.)

## EMERTON'S CASE.

*S. C. ante*, p. 389, and *Sir R. Viner's case*, *post*, p. 522.

A HABEAS CORPUS being awarded to Sir Rob. Viner, Lord Mayor of London, for his daughter in law, the wife of Emerson, upon the *pluries* he returned, she was not in his custody at the coming of the first writ, *nec unquam postea*; and upon affidavit it appearing to the Court, that she had been in his family after he had been served with the first writ, the Court granted a rule to be served upon him, that he should attend the Court, and give an account what was become of her.

Indictment lies for a false return to a *Hab. corp.* *Post*, p. 522.

And *Hale*, Ch. Just. said, that an officer was indictable for making a false return to an *Habeas corpus*.

(C. 526.)

## THE MAYOR AND COMMONALTY OF LONDON v. B.

*S. C. City of London v. Decosta*, 3 Keb. 491.

Two actions brought at the same time, for the same thing, may be pleaded in abatement of each other, and both shall be abated.

Declaration stating a prescription for payment of a duty *per alienigenas*, is supported by proof of a prescription *tam pro indigenis quam alienigenis*. *Per Hale*, C. J.

ACTION for shewage; they brought two actions against the defendant at the same time; in one they prescribed for two-pence an hundred to be paid *per alienigenas*, and in the other the prescription was laid for the payment of the said duty *tam per indigenas quam alienigenas*; and the defendant averred, that both were for the same duty, and so pleaded one in abatement to the other mutually; and so they were both abated (a).

And it was said *per Hale*, that if the prescription be laid for the payment *per alienigenas*, if the evidence prove a prescription *tam pro indigenis quam alienigenis*, this well maintains the issue (b).

(a) *Acc. Pie v. Cook*, Hob. 128. Moor, 864. *Combe v. Pitt*, 3 Burr. 1434. Com. Dig. Abatement, H. 24.

*Bushwood v. Bond*, Cro. El. 722. *Bailiffs of Tewksbury v. Bricknell*, 1 Taunt. 142. *West v. Andrews*, 1 Barn. & Cressw. 84.

(b) That proof of a more ample right than that claimed, is no variance, see

(C. 527.)

SKELINGTON v. NORTON.—*Trin. 25 Car. 2. Rot. 4.**S. C.* 2 Lev. 142. 3 Keb. 422, 460, 494, 539.

*Vid. marg. p.* 412.

*Cro. Car.* 93, 395.

[ \* 402 ]

What is a reputed parish within 43 Eliz. 2. 2 Salk. 487. 4 Mod. 157. Sayer, 278. Dalt. Just. c. 73, § 11.

UPON a special verdict the case was, that there were two vills in one parish, which had used severally to maintain their poor; and now there being overseers made of the whole parish, they were rated together; and the first question was, whether or no they, having been used time out of mind to pay severally, might by the statute of 43 Eliz. be rated together? And *per Hale*, Ch. Just., unless there be a chapel in the vill where the parish church \* doth not stand, it is not sufficient to make it a reputed parish within the statute of 43 Eliz. [2 Roll. 290.]

The second question was, whether or no this being a great parish shall not be rated distinctly by the vills, according to the provision made 14 Car. 2, 12, or whether this, being none of the counties there named, shall not be within the benefit



of that clause? *Hale*, Ch. Just.:—By the words it seems to be intended for all counties in England, because the words are, “or other counties;” but Sir *C. Hopkins* cited the judgment *Post*, p. 413. in the Common Pleas in the case of *Wilson* and *Bonner*, between Chipping Campden and Broad Campden in Gloucester, where the Judges held, that the act of 14 Car. 2 extended to no counties but those named, wherupon the Judges desired to see that record. *Sed semble a moy q’ cest point ne fuit in question la, q’ ne fuit trouve q’ le parish de Campden fuit un grand parish. Et adjournatur.* [*Post*, p. 412.]

DRUE v. BAYLIE.

*S. C. ante*, p. 392.

( C. 528. )

THE case was this; an administrator, possessed of a term left by the intestate, demises it for part of his time, rendering a rent to him, his executors, administrators and assigns; and there is a covenant to pay the rent, and a bond to perform covenants; the administrator dies, and makes his executor, the plaintiff, who brings his action upon this bond.

The only question was, whether or no the executor of the administrator had right to this rent; for it was admitted, that this being a covenant for the payment of rent, and the bond to perform the covenants, that if the rent is gone, so are the covenant and the bond too.

And it was argued by *West pro def*’, that this was a rent-service, and so could not come to the executor of the administrator, but would wait upon the reversion, which should go to the administrator *de bonis non* of the intestate; and the plaintiff here, who is executor, is a mere stranger to the reversion. 2 Ed 4, 5, 11.

2. If the lessor (*lessee*) in this case should be liable to this action, then he should be doubly charged; for the administrator *de bonis non* would sue him for the rent, by reason he hath the reversion.

3. By this means the creditors of the intestate would be defrauded, for this executor of the administrator is not liable to any action, and such an executor shall have no execution of a judgment obtained by the administrator in right of the intestate. 5 Co. 9. *Vide* Hutton, 79. Lat. 267.

Serjeant *Stroud pro quer.* argued, that the administrator *de bonis non* could not have it, because he comes in paramount the reservation; and that is the reason why in *Chun’s* case in 10 Co. where tenant for life reserves a rent payable at Michaelmas, or forty days after, and dies within the 40 days, the reversioner shall not have this rent, because he comes in paramount the reservation; but where tenant in fee makes such a lease, his heir shall have it, as it is there held; and so if one jointenant makes a lease, and dies, his companion shall not have the rent, because he comes in paramount the reservation; and so if the lessee for life makes a

An administrator makes an underlease of the intestate’s term rendering rent to himself, his executors, &c. and dies: his executor, and not the administrator *de bonis non*, shall have the rent, and shall be chargeable with it as assets, in the nature of an executor *de son tort*. But (*semb. ante*, p. 392,) he cannot distrain for it.

Covenant for payment of rent, and a bond to perform covenants, are defeated by the determination of the rent. *Ow.* 136.

[ \* 403 ]  
*Post*, C. 609.

lease for years, reserving rent, and surrenders, the rent is gone, as appears 1 Co. 96. Dy. 187; and relied upon the case of Baron and Feme, 1 Inst. 46 b, where a man, possessed of a term in right of his wife, leases reserving rent, and dies, the wife shall have the residue of the term, but the executor shall have the rent.

(1) *Ante*, p. 171-2, 336. Skin. 5. 11 Vin. 324. 1 Barn. & Cres. 155.

(2) Yelv. 33. Cro. Car. 459. But see 17 Car. 2, c. 8.

Administrator takes a man in  
[ \*404 ] execution and dies, the administrator *de bonis non*, (and not the executor) may discharge him. Cro. Car. 459. 6 Mod. 298, 300. 1 Sal. 306.

Latch, 267.

D. fraudulently conveys to B., and then leases to C., rendering rent; B. shall have the rent.

*Hale*, Ch. Just.:—The administrator hath a double capacity in him when he makes this lease; one in his own right, and the other in right of the intestate; and though he hath this term wholly in right of the intestate, yet when he makes this lease, he hath power to dispose of the whole; and by making a lease of part he doth appropriate that to himself, and divides it from the rest, and hath the rent in his own right; and if he brings an action for it, it must be brought in the *Debet* and *detinet* (1), as where he sells a horse and sues for the money; and so having the rent in his own right, the administrator *de bonis non* cannot claim it, because he comes in paramount; as if an administrator obtains a judgment and dies, the administrator *de bonis non* shall not have execution of it, but must begin again (2); and so he shall never have an action of debt where the precedent executor or administrator hath sold an horse or other thing.

And in this case, when the executor of the administrator recovers the rent, he shall be chargeable with it as assets in the nature of an executor *de son tort*; for the administrator having power to dispose of the term which he had in right of the intestate, this rent, which is reserved to him and his executor, is a continuing interest in them in the same right.

If an administrator hath taken a man in execution and dies, his executor cannot discharge this man out of execution, but the administrator *de bonis non*; he, being taken as \* a pledge for the debt of the intestate, shall go as the intestate's estate unadministered; but if the money be brought into Court upon the judgment, there his executor hath the interest. If an executor hath a man in execution, and he escape, the action against the sheriff must be brought in the *Detinet* only (a); but if an executor makes a lease rendering rent, the action must be brought in the *Debet* and *detinet*. And he put this case; D. makes a fraudulent conveyance to B. and then leases to C. rendering rent; the question was, who should have the rent? for D. had dismissed himself of all his right, and so it was not reason that he should have it; for though the conveyance to B. was nought against a purchaser, yet it was good against him that made it; and therefore it was the opinion in a case between *Woodroff* and *Cooke*, that B. should have it, for otherwise the lessee would pay no rent; and though the statute doth relieve the lessee against a fraudulent conveyance, yet it is not intended that he shall hold it rent free.

(a) See Cro. El. 326. Cro. Jac. 546. S. C. Carth. 49. Com. Dig. Pleader, 2 Hob. 272. *Breck v. Cook*, 1 Show. 57. D. 1.

And though the administrator that made the lease might sue in the *Debet* and *detinet*, yet the rent is partly incident to the reversion; for a reversion *in auter droit* may be sufficient to preserve the incidency of the rent in your own right; and so in case of a parson who leases, reserving rent, though he hath this rent in his own right, and may bring an action of debt in the *Debet* for it, yet it is a rent-service, and so is in a manner incident to the reversion which he hath *in auter droit*; for he may distrain for it, and yet it shall not go to the successor with the reversion.

And so in the case of baron and feme, where the baron *Ante*, p. 393. makes the lease, it is a rent-service, for he may distrain for it; and yet when he dies, it shall not go with the reversion, but the feme shall have the reversion, and the executor shall have the rent. *Et advisare volant*; but all inclined *pro quer'*.

*Et postea judgment fuit done pro quer' (b).*

(b) This case is cited in *Noel v. Robinson*, 1 Vern. 94; and see *Barker v. Talcot*, 1 Vern. 473. *Anonymus*, Skin. 143. *Norton v. Harvey*, 1 Vent. 259. *Anon.* 2 Vent. 362. *Betts v. Mitchell*, 10 Mod. 315, cited in *Hosier v. Lord*

*Arundel*, 3 Bos. & Pull. 7. But the case of *Catherwood v. Chabaud*, 1 Barn. & Cres. 150. S. C. 2 Dow. & Ryl. 271, seems to favour the claim of the administrator *de bonis non*, &c. and see *ante*, p. 284.

### HODGKINS v. THORNBOROW.—*Pasch.* 27. *Rot.* 217.

( C. 529. )

S. C. 1 Vent. 276. 2 Lev. 143. Pollexf. 141. 3 Keb. 500, 505, 518, 541, 557.

THE plaintiff leases for fifteen years; the lessee leases part of the term to J. S., and J. S. leases to the plaintiff. The question was, whether or no the plaintiff's rent were suspended? *Post*, p. 417, in marg.

\* And *Rawlins's* case, 4 Co. 52, was much relied upon for the suspension of the whole rent, which was alleged by the counsel to be the very same with this, and Bro. *Extinguishment*, 48. 7 Co. 23. 2 Cro. 160. 1 Roll. 938. [ \*405 ] 16 Ed. 3, 15. 1 Inst. 148.

*Hale, C. J.*:—*Rawlins's* case is concerning a condition which must necessarily be suspended, for otherwise the breach of it would defeat the lessor's estate contrary to his intention.

And if in this case any part of the rent be suspended, the whole must be suspended; for there can be no apportionment in this case, the whole reversion being in the first lessee. And *Hale* said, he had ruled it upon evidence a hundred times upon the issue *nil debet* or *non expulit*, that if it appeared, that the plaintiff entered by the consent of the lessee, that this was no such entry or expulsion as would avoid the payment of the rent; and though many books seem to intend the contrary, yet this hath of late been the constant course; and the contrary would be very inconvenient, for

Entry of lessor by consent of lessee, is no suspension of rent. *Post*, 417 (a).

(a) What shall amount to an eviction, see *Hob.* 326. 1 Ld. Raym. 370. *Willes*, 129. *Bull. Ni. Pri.* 165. *Hunt v. Cope*, *Cowp.* 242. *Burn v. Phelps*, 1 Stark. 94.

*Smith v. Raleigh*, 3 Camp. 513-4, and note (2), to *Salmon v. Smith*, 1 Saund. 204.

then the lessor could not take a backside nor a pigs-court, nor any conveniency from his lessee without suspending his rent. *Adjournatur*.

And it was said by *Saunders*, that this is not like the case of a seigniorie or a rent charge for life, there the party hath no remedy but by assise or distress; but here the action is brought upon the contract between the parties. And the Court inclined, that the action would lie; and they denied the third resolution in *Rawlins's* case. [Continued *Post*, p. 413-7.]

( C. 530. )

HARTWELL v. KECK.—*Pasch.* 27. *Rot.* 468.

*S. C. Harpool v. Kent*, 1 Vent. 306. T. Jon. 76. Pollexf. 199. 3 Keb. 500, 575, 731, 820.

Whether a contingent remainder is destroyed by the descent of the inheritance upon the tenant of the particular estate?

A WRIT of error to reverse a judgment in Ireland.

A feoffment was made to the use of Robert the father for life, the remainder to the use of William the son for life, the remainder to the first, second, and third son of William in tail *successive*, the remainder to the right heirs of Robert; then Robert the father dies, and the reversion in fee descends upon William the son before he had any issue, and afterwards he had a son. The question was, whether or no the descent of this reversion in fee, descending upon William the remainder-man for life, had so merged his estate as to destroy the contingent remainders?

[ \* 406 ]

And it was argued by *Appleton* that it had not, but that when the remainder-men were born, the estate should open, and let in the contingent remainders; and he said, it was \*like *Lewis Bowls's* case, 11 Co. 79. 1 Co. 101, where the estate, though it be closed and shut, yet, when the contingent remainder happens, it shall open and take in the contingent remainder.

*Pollexfen pro def'* said, if the particular estate be destroyed before the remainder come *in esse*, the remainder is gone. 1 Inst. 298. Cro. Eliz. 630. Cro. Car. 102. *Piggot v. Smith*, 1 Co. 66. Moor, 374. *Penny's* case.

*Hale* inclined to think the remainder was destroyed. *Sed adjournatur* (a).

(a) This case was never adjudged; but for default in the writ of error the Court could not proceed to judgment, but inclined to affirm it. *S. C.* Pollexf. 206, 578. See *Wood v. Ingersole*, Cro. Jac. 260. *Plunket v. Holmes*, 1 Lev. 11. T. Ray. 28. *Fortescue v. Abbot*, 2 Lev. 202. T. Jon. 79. *S. C. post*, p. 452, 481. *Duncombe v. Duncombe*, 3 Lev. 437. *Harrison v. Belsey*, T. Ray. 413. 1 Vent. 345. *S. C. post*, p. 484. *Boothby*

*v. Vernon*, 9 Mod. 147. *Hooker v. Hooker*, R. T. Hardw. 13. *Doe v. Soudamere*, 2 Bos. & Pull. 289. *Doe v. Jones*, 1 Barn. & Cress. 241; and see the point discussed in *Fearne's Cont. Rem.* p. 341, &c. 7th edit. *Preston on Merger*, p. 488, 493. Serjt. Willms. note to *Purfoy v. Rogers*, 2 Saund. 382, a, b, c. 2 Cruise Dig. 356-7-8, 2d edit. Harg. Co. Lit. 28 a. n. 8.

## THE KING v. PARSONS.

( C. 531. )

Continued from p. 397.

It was now moved again in the behalf of Parsons, that it did not appear by the indictment that the prosecution was within six months, as it ought to be by the statute of 13 Car. 2, 1, (for the indictment was upon the statute). But it was answered by the Court, that the king need not allege it; but it must come on the other side to plead it, if it were after the six months. And by *Twisden*:—It might have been given in evidence, being a proviso in the same statute; but a proviso in another statute must be pleaded.

It is not necessary to allege in an indictment that the prosecution was commenced within a time limited by statute.  
2 East, 333-6.

*Note*, that the words which he used were to this effect: "A king, when he hath been turned out of his kingdom by his subjects, and then by the great providence of God is restored again, first comes peaceably and settles his militia, and grows strong, and then turns an absolute tyrant, even so the devil at first pulls men gently by the elbow, then turns to be a tyrant over them."

2 Roll. 78.

And it was resolved in this case, that Justices of oyer and terminer may try a man the same day that he is indicted; but justices of peace cannot, though they have a kind of commission of oyer and terminer (*a*). And *Hale* said, that justices of gaol delivery and of this Court, do award a jury, *ideo venit inde jurata*, &c.; but Justices of oyer and terminer must award a precept (*b*).

Justices of oyer and terminer may try on the day of the indictment: *aliter*, of justices of the peace.

Style, 28, cont.

1 Roll. 798.

2 Roll. 625.

Another objection was, that it was *anno regis*, but not *anno regni regis*; but that was held good, because *anno regis* shall be intended the year that the king is king.

*Anno regis*, instead of *anno regni regis*, good.

(*a*) 4 Inst. 164. 2 Hale, H. P. C. 28-9, 261. See 60 Geo. 3, c. 4.

(*b*) 2 Hale, H. P. C. 260-1, 410. 2 Hawk. P. C. c. 41, § 1.

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## BARNISH v. KILLICK.

( C. 532. )

S. C. *Burage v. Killing*, 3 Keb. 507. 1 Vent. 272.

TRESPASS for fishing in his several piscary, *et quod pisces suos cepit*, and doth not say of what kind, or how many. And *Hale* seemed to incline that it was naught; for if a man should declare in trespass for taking *averia sua*, or *pullos suos*, he said it would not be good according to *Plater's* case, 5 Co. 34. [Cro. Car. 554.] *Sed adjournatur. Sed vide ante*, Case 61, *contra*.

Trespass for taking the plaintiff's fishes without stating the kind or number: *quare*, whether good? *Vid.* 1 Vent. 329. *Ante*, C. 140, p. 121.

## WEBB v. BATCHELER.

( C. 533. )

Continued from p. 396.

It was now urged by *Holt*, that though the defendant did do this as an officer to a justice of peace, he is not excusable; as Cro. Car. 394. 32 Ass. 64.

But it was objected by *Stroud*, that there the officer of

11 Co. 44.

one parish enters into another parish where he had no authority to serve a warrant.

2 Roll. 560.

Bro. Faux  
Imprison. 8.

And *Hale* said, it would be too hard if an officer should be bound to examine the regularity of the proceedings of a justice of peace, for antiently justices of the peace granted out no warrants but after indictments found; but now they do upon complaint made to them upon oath (a), and yet the constable cannot examine whether oath was made or not. And *per totam Curiam*, judgment was given for the defendant. [S. C. post, 457, 488.]

(a) 2 Hal. P. C. 108. 4 Black. Com. 290.

( C. 534. )

*Semb. S. C. Corporation of Hadley v. Gayle, 3 Keb. 509.*

An attorney of B. R. cannot be fined for refusing to serve as common-council-man in a corporation. *Vid. Officina Brev. 166, 174. 4 Burr. 2109.*

AN attorney of this Court being chosen to be of the common council in a corporation, and refusing, was fined. And it was held by *Hale*, that upon an action of debt brought for the fine, he might plead his privilege; for if he ought not to have been chosen, then the fine was never lawfully set.

( C. 535. )

WIGSTON v. GARRETT.

S. C. 1 Vent. 278. T. Ray. 239. 2 Lev. 149. 3 Keb. 366, 489, 510, 536, 572.

See margin,  
post, p. 411.

BETWEEN the Lord Leigh and the Earl of Leicester the case was, that Robert, Earl of Leicester, 21 Eliz. made a conveyance of the lands in question, with a power of revocation and limitation of new uses by any writing under his hand and seal, &c. About two years after \*he covenants (1) to levy a fine to new uses, without taking notice of the power reserved to him in the former deed, and afterwards levies a fine accordingly. The question was, whether or no by this deed of covenants and fine his power was extinguished, or whether it should be an execution of his power, and then the fine should enure to the uses contained in the deed of covenants? And a case was cited by *Finch*, (who argued for the Earl of Leicester) between *Ingram* and *Parker* in the Common Pleas, Mich. 6 Car. Rot. 1942 (1442), where it was held by three Justices, that a bargain and sale not inrolled and a fine levied thereupon, was no execution, but an extinguishment of such a power; and he said, a bargain and sale there would do as much as the deed of covenants here, which is to direct the uses of the fine; for it will serve for that purpose, though it be not inrolled.

[ \*408 ]  
(1) "By writing sealed and subscribed." *Vid. 1 Vent. 278.*

Uses may be revoked by bargain and sale, without enrolment. *Semb. per Hale, C. J.*

But *Hale, C. J.*, did question the law of that case: and *Twisden* said, the Judges differed in opinion about it: and *Hale* held, that such uses may be revoked, and new uses raised, without making a legal conveyance; for the new estate rises out of the old conveyance by virtue of the power, if it be pursued; and therefore he conceived the enrolment was not



necessary in the case of revoking or raising new uses by such a power; and he said he remembered a case between *Rogers* and *Canning*, where such a power was reserved to make leases for three lives; and the question was, whether or no it was necessary to make livery; and it was held, that it was better to do it without livery, for perhaps that might do hurt; because then he seems not to rely or make use of his power: and he said this covenant to levy a fine would not do it of itself without levying the fine, because it is relative and ambulatory till the fine is levied; as where such a power is reserved to be done by will, though the party do make his will, yet this is no execution till the death of the party; and so if he had covenanted to stand seised to such uses upon the payment of 10s. this had been no execution till the payment of the 10s., because it relates to that time; and a case was cited between *Spencer* and *Wigley*, Hil. A. D. 1654. Rot. 1794. *Sed adjournatur*. Post, Case 543. (p. 411.)

Cro. Car. 336.  
1 Inst. 113.

Power to lease for lives may be executed without livery.  
1 Vent. 291.  
2 Lev. 149. 3  
Mau. & Selw. 405.

Hob. 303.

And *Hale* said, this was much like *Scroope's* case, 10 Co. 143.

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HILL v. MONTAGUE.—Hil. 26 & 27. Rot. 174.

( C. 536. )

S. C. 2 Lev. 144. 3 Keb. 513-6.

In an action for an escape the sheriff pleaded a rescous. And *per Twisden*, though it be no plea for an escape upon an execution, yet upon mean process it hath been held good. 2 Cro. 419. Moor, pl. 1152. *Cur' advisare vult*.

Rescous is a good plea to an action for an escape on mesne process.  
2 Roll. 457, 459.  
1 Roll. 807.

Afterwards judgment was given for the defendant (a). *Vide* 3 Bulstrode, 200. Jon. 201, *cont*.

(a) Acc. Bull. Ni. Pri. 63. *Crompton* son, 5 Burr. 2812. *R. v. Sheriff of Middlesex*, 1 Barn. & Ald. 190.  
*v. Ward*, 1 Stra. 429. *O'Neil v. Mar-*

### BROWNE'S CASE.

( C. 537. )

S. C. Mercer v. Brown, 3 Keb. 514.

ASSUMPSIT against an executor. In consideration the testator was indebted to him, the executor promised to pay. And resolved, it was no good consideration without averment of assets, or that he was commencing a suit, &c. for if this action should lie, it would charge him out of his own estate (a).

*Assumpsit* against an executor, on a promise by him to pay in consideration that the testator was indebted, held bad.

(a) *Ante*, p. 125. Post, p. 434, 464. Such a promise is *nudum pactum* and not personally binding, *Reech v. Kenne-gal*, 1 Ves. Senr. 126. But the defendant is chargeable as executor to the extent of assets; and this is the common

form of declaring when the plaintiff relies on some acknowledgment or promise since the testator's death. *Rans v. Hughes*, 7 Term Rep. 350 n. 1 Saund. 210, note (1). 2 Saund. 137 b, c, note (2). See *Childs v. Monins*, 2 Brod. & Bing. 460.

( C. 538. )

*Semb. S. C. R. v. Altop & Bently, 3 Keb. 516.*

How far a conviction under 13 Car. 2, for deer-stealing, is examinable in B. R.

MEMORANDUM, upon the statute of 13 Car. 2, of deer-stealing, where a conviction was had before a justice of peace, the Court will send a *Certiorari* and examine the regularity of the proceedings. But *Hale* held, they could not send such process out of this Court; but if they saw cause they would remand the parties, if they came by *Habeas corpus*; or if it came by *Certiorari*, and the conviction was fair, they would send down the record; but in this case, the purchase being foul, the Court ordered that proceedings should stay, and they would take time to consider of it till Michaelmas Term.

( C. 539. )

*Semb. S. C. R. v. Carewell, 3 Keb. 518.*

Whether an information lies in B. R. upon the statute for selling with wrong measures.  
Cro. Car. 465.  
11 Co. 63.

It was likewise doubted, whether an information would lie in this Court for selling by wrong measures; because the conviction is ordained to be before a justice of peace, and the penalty to be levied by him. And *Hale, C. J.*, inclined that it could not; though it was moved by *Finch*, that the justices of peace are to determine matters concerning forcible entries by the statute, and yet this Court doth often award execution (a).

(a) The statute was probably 16 Car. 1, c. 19. See *Anon. ante*, p. 100, and *ante*, C. 509; *post*, C. 604.

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## JENNINGS v. HUMKINS.

( C. 540. )

*S. C. 1 Vent. 263. 2 Lev. 121. 3 Keb. 350, 371, 509.*

Trial in a wrong county is not aided by the statute of jeofails.

ACTION for saying he was perjured laid in Cornwall; the defendant justified, by reason he made an affidavit before J. Vaughan in Devonshire, that he did not consent, that J. S. should be lessor in ejectment, &c.

The plaintiff traversed the perjury.

This issue was tried in Cornwall, and the question was, whether or no this was a mis-trial aided by the statute of jeofails; because the words are, so as the cause be tried by a jury of the proper county where the action is laid.

And it was held, that if the trial be in a wrong county, where the issue doth not arise, it is not aided; because the statute intends remedy only, if the *venue* be from a wrong place in the proper county: but *Hale* said, if the matter contained in the affidavit was transacted in Cornwall, then it might be tried well enough there.

But afterwards, as I heard, a new *venue* was awarded to try the matter in Devonshire (a).

(a) But see *Crafte v. Boite*, 1 Saund. 246, and note (3), *ibid. Ante*, C. 42, 195. *Post*, *Chamberlain v. Ainsworth*, p. 437.

( C. 541. )

**DEBT** upon an obligation to perform an award; the plaintiff in his replication had ill assigned a breach, and therefore prayed leave to discontinue; but the award being for the payment of money, the Court would not give leave, for they said he might have his action of debt upon the award (a).

F. N. B. 121.

(a) *Vid. Jenkinson v. Allisson, post, p. 415, which seems to be S. C. See 3 Keb. 513, 556.*

## DE TERM. S. MICH. 1675.

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IN BANCO REGIS.

## SIR WILLIAM BUCKNALL'S CASE.

( C. 542. )

*Semb. S. C. Bucknall v. Selweed, 3 Keb. 522, and Anon. 1 Vent. 274.*

HE had brought an action upon a bond (with a special condition) in the Common Pleas; and after he had obtained judgment there, the defendant brought a writ of error in the King's Bench, and there judgment was affirmed, and he took out an execution there; and because it did not appear in the writ, how the cause came thither, but ran generally as if it had been upon a judgment in a suit originally commenced there, the Court superseded the execution *quia erroneè emanavit*: and it was said by the clerks there, that the course was always there to have a special execution when it was upon a judgment affirmed in a writ of error.

A writ of execution upon a judgment affirmed in B. R. must shew how the cause came there. See Archbold's Forms, p. 233-4. Tidd's Forms, p. 637-8, 6th edit.

## WIGSTON v. GARRETT.

( C. 543. )

Continued from p. 408.

Now this case was argued by *Hopkins*, that this deed and fine was an execution of the power, and not an extinguishment, and he cited these authorities. Cro. Car. 472. Moor, 296. Roll. 755. Hob. 312. *Finch* argued *è contra*, that where there is a power of revocation, it ought to be strictly pursued in the execution. 10 Co. *Scroop's* case. And he said that the deed of covenants alone would not be a revocation, because that related to the fine, and took no effect till the fine levied; and the fine could not do it, because that was not a writing under hand and seal, *ad quod Cur' consentiebat*. But the Court held strongly, that *eo instanti* that the fine was levied, the deed had its operation, and then amounted to a revocation; and *Hale* said, admitting the case of *Ingram* and *Parker* to be law (which he inclined not to believe), yet that case differs from this, for there the party that bargained and sold was tenant in tail, and so the conveyance might have operated either out of his interest or out of his power, and where it stands so, and a conveyance is made without any relation to his power, it shall be presumed rather to work out of his

A power of revoking by writing under hand and seal is well executed by a covenant to levy a fine to new

[ \* 412 ] uses, and a fine levied accordingly. But neither the covenant nor the fine would alone be a good execution.

Where one, who has an interest and a power, makes a convey-

ance without reference to his power, it operates on his interest, unless a contrary intent appears (a).

A fine levied to lessee for years, to make him a tenant to the *præcipe*, will not merge the term. 2 Cro. 643. *Ante*, p. 384. 1 Vent. 280.

A power may be executed by lease and release. *Ante*, p. 384, 392. 1 P. Will. 149.

interest, unless some intent appears, that it should work out of his power: but in this case, unless the deed and fine work out of the power, it can have no operation at all; for that the estate was out of the Earl of Leicester when this conveyance was made; and he compared it to the case of a devise, where a feoffment is made to the use of his last will and testament, *quod vide*, 1 Inst. 111 b.

*Per Hale*:—If a covenant be to levy a fine to lessee for years, to make him a tenant to the *præcipe*, to the intent that a recovery may be suffered, which is done accordingly, the term is not merged, because of the intent.

*Per Hale*:—A. leased to B. for years, and covenanted to levy a fine, and then B. redemises to A. and then the fine was levied: it was ruled that the fine had extinguished the term; but if any intent had appeared to preserve it, it had been otherwise. [*Ante*, p. 392.]

*Per Rainsford*:—If he that hath a power of revocation makes a lease and release, this is a good revocation, and the power is not suspended by the lease, because they both are but as one conveyance. The Court strongly inclined, that the deed and fine was a good revocation; but Mr. *Attorney* being retained to argue, *adjournatur*; but it was afterwards adjudged, that the deed and fine was a good execution of the power (b).

(a) Sugd. Pow. 287, 2d edit. *King v. Melling*, 1 Vent. 228. *Langley v. Sneyd*, 3 Bro. & Bing. 243.

(a) See *Herring v. Brown*, 1 Vent. 368, 371. *S. C. post*, p. 486. 2 Show.

185. Carth. 22. Skinn. 35. *Hawkins v. Kemp*, 3 East, 498. Sugden Powers, p. 68, 2d edit. Gilb. on Uses, 279. 4 Cruise Dig. p. 244-5. Com. Dig. Poier, C. 3.

( C, 544. )

### SKELLINGTON v. NORTON.

Continued from p. 402.

A large parish cannot be rated distinctly by the vills, according

[ \* 413 ]  
to stat. 13 & 14 Car. 2, c. 12, § 21, unless it be found to be so large that it cannot reap the benefit of 43 Eliz. 3 Burr. 1610. 1 Dougl. 346. 7 East, 214.

Whether justices may tax a neighbouring vill in aid?

Now the Court gave judgment for the defendant, because, though it was found to be a large parish, yet it was not found to be so big, that by reason of the largeness thereof they could not reap the benefit of the act of \* 43 Eliz. according to the words of the statute, and for that reason the Court gave judgment; and so did not positively rule, that no counties were within the act but those named; but *Hale* did now strongly incline, that no other counties were within the act (a); and he said the inconvenience would be very great; for by that means the poor boroughs must be charged with the poor, and the vills, where men of good estates lived, but perhaps no poor, would be at no charge at all.

And it was objected by *Bigland*, that the justices of peace had power to assess a neighbouring town, where the parish is not sufficient to relieve their poor: but *Twisden* said, that had been a great question, for though they may tax the

(a) *Sed vide cont. Dolting v. Stokelane*, 1 Bott. 35. 4 Chetwy. Burn, J. 13. *Clifton v. Churcham*, Andr. 314.

neighbouring parishes, yet it hath been a great question, whether they cannot tax the neighbouring vills (b). *Jud. per Curiam pro def.*

(b) That vills are within the equity of the statute, see *Anon. Foley*, 25. 4 Burn, J. 116.

### HODGKINS v. THORNBURY.

( C. 545. )

Continued from p. 405.

In this case *Hale*, Ch. Just. held his opinion strongly, and said he could see no difference between this case and that of *Dorrell* and *Andrews*, 1 Roll. 938; but he said, if the rent must be apportioned in this case, there might be a question how that should be; as if A. lease to B. twenty acres of 20s. a-piece value, and B. redemises one of those acres to A. for 5*l.* now whether the apportionment should be by recouping this 5*l.* or whether 20s. should be abated, and the first lessee have the 5*l.* over and above?

But he said, that the book of 17 Ed. 3, 57, was to the principal case in the very point.

But if it were in case of a lease for life, there it may be it might be suspended, because there is only a real remedy, as by distress or assise, which shall not be apportioned, but the whole shall be suspended, because the remedy is upon the whole land; but here it is upon the contract, and a personal remedy. *Sed Curia advisare vult.* [*Post*, p. 417.] *Post*, p. 418.

### WAKEMAN v. WAKER.

( C. 546. )

S. C. 1 Vent. 294. 2 Lev. 150. 3 Keb. 544, 547, 586, 595, 619.

A. MAKES a conveyance of a manor and rectory to the use of himself for life, with remainders over, with a proviso that he might make leases of any part of the premises, not exceeding three lives or twenty-one years, \* reserving for every acre so leased 5s. and that the leases should be good, and continue so long as the tenants did pay the rents, &c. He makes a lease of this rectory, which had no glebe belonging to it; the question was, whether or no this was within his power, because here could be no reservation of 5s. an acre, according to the power? And it was held strongly by *Hale*, Ch. Just. that he might make leases of this rectory, reserving what rent he pleased; and he relied upon the resolution in *Cumberford's* case, 2 Roll. 262, and said he could not differ this case from it (a).

A power of leasing premises, consisting [ \* 414 ] of land and a rectory without glebe, reserving a rent of 5s. an acre, authorizes a lease of the rectory at any rent.

(a) See *Winter v. Loveday*, *post*, p. 507-8. *Smith v. Ashton*, *ante*, p. 309. *Campbell v. Leach*, Ambl. 740. *Foot v. Marriot*, 3 Viner, 431. *Goodtitle v. Fumican*, 2 Dougl. 564. *Pemery v. Par-  
tington*, 3 Term Rep. 665. *Doe v. Rendle*, 3 Mau. & Sel. 99. Sugd. on Pow. p. 573-9, 2d. edit. 4 Cruise Dig. p. 204, 210, 2d. edit.

*Semb.* A lease containing the words "the lessee paying his rent," or "so long as the lessee shall pay the rent" is not avoided by non-payment.

*Ante*, p. 24, 242.

And he said, that where the words are, "the lessees paying their rents," or "so long as the lessees shall pay the rents," non-payment would not defeat the leases, for then upon every breach of covenant the lease should be avoided (a).

And he held, that where an estate for life was limited upon a fine with a proviso to make leases, and it was agreed that the cognisees should stand seised to the use of the lessees, so long as they paid the rents and performed the covenants, that this would not amount to a condition; and if it did, yet the lease should not be void for not paying the rent without an actual demand.

(a) *Lady Baltinglass's case*, *ante*, p. 23-4. *Hayes v. Bickerstaff*, p. 194.

( C. 547. )

### BROWNING v. HONYWOOD.

*S. C. ante*, p. 339. 3 Keb. 188, 549, 617.

Effect of the word *grant* or *dedi* in a conveyance.

GRANT and *infeoff* in case of a freehold doth not amount to a covenant, but *dedi* will make a warranty. *Ante*, Case 421. 3 Keb. 188. And if a chattel be evicted, *dedi* will make a covenant, *come semble*. Hob. 4 (a).

(a) *Ante*, p. 57. *Seddon v. Senate*, note *ibid.* 2 Tho. Co. Lit. 252-3. Com. 13 East, 63, 72. *Barton v. Fitzgerald*, Dig. Covt. A, 4. 15 East, 538. Co. Lit. 384 a. and Butl.

( C. 548. )

An order for a yearly payment by the reputed father of a bastard, is bad. 1 Sld. 222.

NOTE, that where justices of peace had made an order for the paying of 4*l.* yearly by the reputed father, for the maintenance of a bastard child, it was held to be nought; for the allowance ought to be paid weekly, *per stat.* 31 [18] Eliz. c. 3; and if it should be only payable yearly, the party might die within the year, and so the parish lose their charges.

( C. 549. )

### LORD FITZWATER'S CASE.

*S. C.* 2 Lev. 139. 3 Keb. 555 (a).

New trial granted, where the [ \* 415 ] jury determined their verdict by throwing dice.

A VERDICT being for my Lord Fitzwater in a *quo warranto* for a piscary in Essex, it appeared to the Court, that the jury were divided in judgment, and at last, being wil\*ling to be at liberty, resolved to give a privy verdict, and to throw dies for which side they should give their verdict; but considered withal, that they might agree together afterwards and change their verdict; and the chance falling out for my Lord Fitzwater, they gave their privy verdict for him; and the next morning those six, that did dissent in judgment from the verdict, did meet in Westminster-hall, and agreed to stand to the verdict; but the whole jury never had any consultation afterwards together, but came up all to the bar and stood to their privy verdict.

This matter appearing to the Court, *per totam Cur'* a new trial was granted; for a trial by jury, being the solemn trial of

(a) There are other reports of *S. C.* but not containing *S. P.*



the nation upon which our lives, liberties and estates do depend, it ought to be with all fairness, without any thing to bias them; and here it appearing clearly that the chance of the die did govern them in giving their privy verdict, and they never after had any farther conference all together, the whole Court *seriatim* delivered their opinion for a new trial (a). And *Twisden* cited a case, where the plaintiff slided in evidence to the jury, which was not read in Court, and though the jury all made oath that they never looked upon it, yet they giving a verdict for the plaintiff, it was set aside.

Cro. Eliz. 616.  
Co. Lit. 227 b.  
Bull. N. P. 308.

But *note*; there was a miscarriage in the party for whom the jury found. *Wylde* would have had the jury in this case fined for the misdemeanor, but the Court would not assent to it (b).

(a) *Foster v. Hawden*, 2 Lev. 205.  
*Philips v. Fowler*, Comyn, Rep. 525,  
and acc. Willes, 488. 1 Stra. 642. 1  
Term Rep. 11.

(b) See, as to fining, *Foster v. Haw-*  
*den*, in last note. *Bushell's case*, ante,  
p. 1, and notes *ibid.* *Bellamy v. Player*,  
ante, p. 80.

### JENKINSON v. ALLISSON.

( C. 550. )

S. C. 3 Keb. 513, 556.

DEBT upon a bond to perform an award.

The submission was to stand to the award, so as it be made before the — day of May, ready to be delivered to the parties. Upon *nullum fecerunt arbitrium* pleaded, the plaintiff replies, that an award was made under hand and seal, but doth not aver, that it was ready to be delivered to the parties; and for that reason the Court held the replication naught. [Cro. Car. 541, cont. Jon. 431. 1 Roll. 416 (a).]

In debt on bond to perform an award, the plaintiff must aver that it was ready to be delivered, &c. where the submission is in those terms.

Thereupon the plaintiff prayed leave to discontinue. And *Twisden* said, he had known it denied, where the award was for the payment of money only, for there he may have an action of debt upon the award; but here the plaintiff had leave to discontinue, paying costs (b).

Discontinuance allowed in debt on bond to perform an award. 1 Lev. 140. Ante, C. 541.

\* *Mes nota*,— That in Easter Term, 1676, the barons held, that it being pleaded to be under hand and seal shall be intended ready to be delivered, without averment.

[ \*416 ]  
Cro. Car. 541.

(a) *Elberough v. Gates*, ante, p. 22.  
*Burges v. Player*, post, p. 467. But see  
the contrary decided in *Marks v. Mar-*  
*riot*, 1 Ld. Ray. 114. *Freeman v. Ber-*  
*nard*, Id. 247. *Anon.* Id. 989. *Joyce v.*

*Anderson*, Hardr. 399. 3 Viner, 117.  
Com. Dig. Arbitrament. I. 6.  
(b) *Henderson v. Williamson*, 1 Stra.  
116. 1 Saund. 73.

### BAGSHAW v. ANDREWS.

( C. 551. )

S. C. 3 Keb. 557, 561, 600.

ESCAPE. The question was, whether, if the sheriff of one county have a prisoner in his custody in another county, (as upon a *habeas corpus*, &c.) and a *latitat* or a *capias* be delivered unto him in another county, this shall charge him

If the sheriff of one county have a prisoner in his custody in another, he may

return *non est inventus* to a writ of *latitat* or *capias*.

*Semb.* a writ may well be delivered to a sheriff, when he is out of his county. 3 Keb. 561.

with the prisoner; or whether he may not for all this return *non est inventus in ballivâ meâ*.

And it was held strongly that the sheriff should not be chargeable, but might well make such a return; and that appears to be the law in the very bodies of the writs; for these are *quod capias si inventus fuerit in ballivâ tuâ. Sed adjournatur*.

Afterwards it was held by *Hale*, that if a sheriff of Warwickshire have a prisoner in Warwick gaol, and a writ be delivered to the sheriff when he is at London, this shall charge him (a).

(a) As to the jurisdiction of the sheriff out of his county, see Dalton's Sheriff, p. 22-3. Bacon's Ab. Sheriff, (F).

( C. 552. )

EUSTACE v. KEPIN.

S. C. 3 Keb. 556.

Writ of error by bail, to reverse judgments in Ireland

against the principal and themselves, abates *in toto*. Cro.

Car. 481. Style, 174. Carth. 447. 1 Ld. Ray. 328.

The record of the judgment against the principal is not removed by such writ of error.

A WRIT of error was brought by the bail to reverse two judgments in Ireland, viz. that against the principal, and that against the bail. And here it was held by the Court,

1. That the writ was abated in the whole. 2. That the record of the judgment against the principal was not removed by this writ; and so it was said had been resolved formerly in one *Booth's* case, which was cited by the Lord Chief Justice, and remembered by *Jones*, Attorney-General. But the question was, how the defendant in the writ of error should proceed to have the fruit of his judgment against the bail, the record being removed hither, and so they could not grant out execution in Ireland? And it was proposed by *Hale*, C. J. to take out *sci' fa'* into Middlesex, upon the recognizances which are now here, and upon the return of them to grant execution into Ireland.

But afterwards it appearing, that those judgments were not made records here, by reason they were not entered upon the rolls, they said they would send a certificate to the

[ \* 417 ]

\* judges in Ireland, that nothing was removed here before then, and thereupon they might grant execution.

But upon the judgment against the principal the party might have execution there, for that record was never removed.

( C. 553. )

HODGKINS v. THORNBURY.

Continued from p. 413.

A. leases premises to B. for years rendering rent, B. under-leases part to C. reserving no rent, and C. assigns to A. who enters: held,

THE plaintiff leased to the defendant an house and close for years, rendering rent; the lessee leases the close for part of the term to J. S. without reserving any rent; J. S. assigns his interest to the plaintiff who entered and held it.

The questions were two:

1. Whether this were a suspension of the whole rent?  
2. Admitting it were not a suspension of the whole, whether

any part of it should be suspended, as this case is, so that there should be an apportionment?

*Ad primam quæst'*:—It was first argued by *Wylde*, *Rainsford*, *Twisden* and *Hale*, that it was not a suspension of the whole rent.

that the entry of A. is no suspension of either the whole or any part of the rent payable by B.

And the reasons they went upon were, because the entry of the lessor in this case is lawful; but they all agreed, that if the lessor enters by wrong into any part of the land, this is a suspension of the whole rent. And they took a diversity between a condition and a rent; for if a condition hang upon a rent, there if the lessor comes to any part of the land, though it be by title, and so extinguish the rent in part, yet the condition is absolutely extinguished: and *Hale* said, the reason is, because the law will not annex that condition to part of the rent which was before depending upon the whole. Another difference was taken between a rent-charge and a rent-service; for in case of a rent-charge, if the lessor purchase part of the land, the whole rent is extinguished; but in case of a rent-service it shall be apportioned; the authorities they cited were 13 Ed. 3, 56 b. and 1 Roll. 938; which they said were directly in the point. Fitz. and Bro. Avowry, 93.

*Ante*, p. 405. Tortious entry of lessor into part suspends the whole rent.

A condition cannot be extinguished in part. 1 Vent. 278. Owen, 41. 5 Viner, 306.

And as for the objections that have been made from *Rawlins's* case, 4 Co. and Bro. Exting. 48, they said, that for that of *Rawlins's* case, it was no point that came in judgment in the case; and for that of Bro. Exting. 48, he cites no authority for his opinion. And *Hale* said, there was the first concoction of this error, that a rent could not \* be suspended in part, and *in esse* for part, which is a notion that hath been swallowed down since that opinion in Bro. but no reason at all was ever given for it, why it may not be suspended in part, as well as extinguished in part, for of that never any question was made; as if lessee surrender part of his term, part of the rent is thereby extinguished. And *Wylde* said, he looked upon all the authorities cited by my Lord Coke in *Ascough's* case, 9 Co. and every one of them is of an entry by wrong, which is agreed by all to suspend the whole rent.

[ \*418 ]

A rent-service may be suspended in part, and *in esse* for part. Cont. Co. Lit. 148 b.

2. And as for apportionment they all held, as this is pleaded, that if any ought to be, the Court could not make it here, for it is pleaded in bar of the whole.

But *Hale*, *Twisden* and *Rainsford* held, that no apportionment ought to be in this case, had the matter been before a jury upon *nil debet*; for here, when the lessee had leased to a stranger, though it were without reserving any rent, and he assigns over to the lessor, the lessor shall come in in the same plight as the stranger, and claiming under him shall enjoy the same privileges: and this diversity was taken by *Hale*, that if the lessee had leased part to the lessor, without reserving any rent, there should be an apportionment; but if a rent had been reserved, there should be no apportionment; for then the lessor and the lessee had as it were by agreement apportioned the rent betwixt themselves, and the lessor

Where the lessee leases part to his lessor, without reserving rent, there shall be an apportionment. Per *Hale*, C. J.

*Ante*, p. 413.

The opinion, that the same person cannot be both lord and tenant, is antiquated.

If tenant alienes part to his lord, entire services are extinguished. *Per Hale*, [ \* 419 ] C. J. Co. Lit. 149 a.

should have had his whole rent of the lessee, and so should the lessee of the lessor; and so he said it would be in case of a seignior, where the tenant leases part to the lord; this diversity concerning apportionment will hold where a rent is reserved, and where none is reserved; but it is much stronger in case of a lease for years, where the rent is due by contract, and an action of debt lies.

He said, there had been an old opinion, that the same man could not be lord and tenant to the same land; and therefore if the father held land of the eldest son, and died, the younger son should have the land; but that opinion is long since antiquated (a).

And here they all held, but *Wylde*, that the lessor coming in under a stranger shall have the same privilege as the stranger; which *Hale* illustrated by this case: lord and tenant rendering a horse, &c. if the tenant alienes part of the land to the lord, the whole service being entire is extinct; but if the tenant had first aliened part to a stranger, and thereby multiplied the service, though part had \* after come to the lord, this should not have extinguished all the services.

*Wylde*:—There might have been an apportionment in this case, if it had been before a jury. *Sed non dedit rationem*. But they all agreed, as this case is pleaded, there could be none. *Jud' per Cur' pro quer' (b)*.

(a) See the remarks of Lord Hale on this maxim in his Hist of Com. Law, p. 258-9, Runningt. edit. Gilb. Ten. 152, and the note by Watkins, *ibid*.

(b) See 18 Viner, 495-6. Bac. Abr. Rent, (M) 1, 3. *Stevenson v. Lambert*, 2 East, 575. *Bliss v. Collins*, 5 Barn. & Ald. 876.

( C. 554. )

### THE CASE OF THE POOR OF WICKHAM.

S. C. 3 Keb. 540. Dalt. Just. ch. 3, § 9.

A toll is taxable to the poor by 43 Eliz. though never before rated time out of mind.

THERE was a toll in that town, that time out of mind had never been taxed to the poor: and the question was, whether it could be now taxed by the statute of 43 Eliz? And the Court held that it might (a).

(a) As to the rateability of tolls, see *R. v. Cardington*, Cowp. 581. *Jones v. Maunsell*, 1 Doug. 302. *R. v. Aire & Calder Navigation*, 2 Term Rep. 660. *R. v. Mayor of London*, 4 Term Rep. 21. *R. v. Page*, *ibid*. 543. *R. v. Staffordshire &c. Canal Navigation*, 8 Term Rep. 340. *R. v. Leeds &c. Canal Company*, 5 East, 325. *R. v. Inhabitants of*

*Tynemouth*, 12 East, 46. *R. v. Sir A. Macdonald*, *ibid*, 324. *R. v. Nicholson*, *ibid*. 330. *Williams v. Jones*, *ibid*. 346. *R. v. Eyre*, *ibid*. 416. *R. v. Milton*, 3 Barn. & Ald. 112. *R. v. Palmer*, and *R. v. Portmore*, 1 Barn. & Cress. 546, 551. S. C. 2 Dow. & Ry. 793-8. *R. v. Bell*, 5 Mau. & Sel. 221, and 1 Nol. P. L. 99—144.

( C. 555. )

### THE KING v. BENT.

S. C. 3 Keb. 545, 552, 561, and *semb*. 2 Lev. 151.

A bailiff errant or a special

AN information was exhibited against a bailiff errant, for executing the office of a bailiff, not having taken the oath

within the statute 27 El. 12; and the question was, whether that statute extended to bailiffs errant, or only to bailiffs of liberties that had *retorna brevium*? And the Court seemed to incline (all but *Twisden*) that it extended not to bailiffs errant, but only to bailiffs of liberties. Jones, 249. 2 Inst. 446.

bailiff is not bound to take the oaths prescribed by 27 Eliz. c. 12.

But they all agreed, that special bailiffs *pro hac vice* to serve writs were not within the statute.

Bailiffs of hundreds were thought by some to be within the statute; and the under-sheriff of Middlesex, being called, confessed, that he swore all his common bailiffs. *Adjournatur*.

And afterwards it was adjudged, that bailiffs errant are not within the statute, *accordant al Jones*, 249 (a).

(a) Bailiffs errant are said to be out of use, Tomlins's Law Dict. tit. Bailiff Dalton's Sheriff.

*S. C. R. v. Aldenham or Alderman*, 2 Lev. 152. 3 Keb. 564-6, 604; and *semb.* (C. 556.)  
1 Vent. 278.

THE coroner's inquisition find a man *felo de se*: the question was, whether or no this was traversable? And the Court inclined that it was; for (*per Hale*) the reason why an inquisition that finds a *fugam fecit* is not traversable is, because all the parties that were present at the death of the party, are bound to attend the coroner's inquest, and their not appearing there is a flying in law, and cannot be contradicted; but that reason doth not hold in a *felo de se* (a).

Coroner's inquest finding a man *felo de se* is traversable.

*Aliter*, when a *fugam fecit* is found.

Justices of the Peace at Sessions may inquire of the death of a man,

[ \* 420 ] where the body cannot be found. 2 Lev. 141.

And it was held in this case, that where the body cannot be found, that it may be inquired of before the justices \* of peace in their sessions, and they may find a *felo de se*. 1 Rol. Rep. 217.

(a) Acc. *Ireton's case*, post, p. 443. Willms. As to the *fugam fecit*, see 1 *R. v. Parker*, 2 Lev. 140. 1 Hale H. Saund. *ubi supra*. 2 Hawk. P. C. ch. 9, P. C. p. 416-7. *Toomes v. Etherington*, § 51. *Cox v. Coleridge*, 1 Barn. & Cress. 1 Saund. 362, 363, note (1) by Serjt. 47.

### THE CASE OF THE INHABITANTS OF FULHAM.

(C. 557.)

*S. C.* 3 Keb. 567.

It was held upon the statute of 2 & 3 Phil. & Mar. cap. 8, that if a man keep several teams in a parish to cart with, though he hath no plough land, that he shall send each team to the repair of the highways, as though they were kept by several persons.

He that keeps several teams in a parish shall send all to repair the highways, though he have no plough-land (a).

(a) Acc. post, p. 490-1. See *Pearson v. Roberts*, Barn. 158, 4th edit. *S. C.* Willes, 670.

## DE TERM. PASCHÆ, 1676.

IN BANCO REGIS.

( C. 558. )

(1) N. B. The Chief J. is created by writ.

MEMORANDUM, that Chief Justice *Hale* resigning his patent (1) this last vacation, Sir *R. Rainsford* was sworn Chief Justice the first day of this term, and Sir *Thomas Jones* was made Puisne Judge the second day of the term; and the Lord Chief Baron *Turner* dying in the circuit at Bedford, Mr. *Mountague*, the Queen's Attorney, was made Chief Baron the first day of this term in his place.

( C. 559. )

A legacy of 20*l.* to A. "when he shall come to the [ \* 421 ] age of 21," lapses by A.'s death during minority: *aliter*, if it be a legacy "to be paid to A. at or when he comes to the age of 21."

SEMBLE *q' le difference de un legacy fuit allow*, that if a man devise 20*l.* to A. when he shall come to twenty-one years of age, there if he die before the age of twenty-one years, his executor shall not have it; but if he devise twenty pounds to J. S. to be paid him at his age of twenty-one years, there, if he die before that age, his executor shall have it; and so it is (by *Wylde*) if he devise twenty pounds to be paid to J. S. when he shall come to the age of twenty-one years. 2 Roll. 299 (a).

(a) *Goss v. Nelson*, 1 Burr. 227, and of Eq. p. 370. Bac. Abr. Legacies, (E) see the cases collected in 2 Fonbl. Treat. 2.

( C. 560. )

KING v. PYNE.

S. C. 3 Keb. 516, 628, 636, 686, 854.

A master is not compellable to take an apprentice. Siderf. 99. 1 Vent. 325.

UPON a motion to quash an order of sessions, the question was, whether or no a master be compellable to take an apprentice; and *Twisden* was of opinion, that he was not, neither by the statute of 5 Eliz. nor 43 Eliz. nor 1 Jac. for there are no words to compel the master to take, though there are to compel the apprentice to serve; and he said those things that are printed as the resolutions of the Judges, were only the opinion of Sir *R. Heath*, when he was Chief Justice, and many of them not assented to by the rest of the Judges, who were of other opinions upon the offering of them in Serjeants Inn Hall; but some clerk happening upon them printed them as the resolutions of all the Judges (a).

But *Rainsford*, Ch. Just. and *Wylde* seemed to hold, that masters are compellable, and the practice hath been so all over England, though there are no express words in the statute. *Adv. vult Cur'.*

*Sed postea fuit adjudge (come a moy fuit dit) q' les masters ne sont compellable (b).*

(a) These resolutions are in Dalton's Just. chap. 73, where the same account of them is given on the authority of *Twisden*. But see *R. v. Fairfax*, Carthew, 94. Caldecott, p. 15, note (c).

(b) The doubts which prevailed on

this point are settled by 8 & 9 Will. 3, c. 30, § 5, which declares the master compellable to receive the apprentice. See 1 Salk. 67, 381. 2 Show. 193. 2 Salk. 491. 1 Black. Comm. p. 426. 8 Evans's Statutes, p. 74-5, notes, 2d ed.



( C. 561. )

UPON the statute of gaming it was held, that at a horse-race, if the articles be for 30*l.* a heat, and so many as come to above 100*l.* that they are void within the statute; and so if a man wins 40*l.* of a man, and then takes bond for it, and lends it him and wins it of him again, and so till it comes to above 100*l.* all the bonds are void; for though they are several bonds, yet it is all as it were a continued act; and so if a man wins money, and then lends it him again, and then they agree to meet and play another day, this will be all looked upon as a continuation of the first act. And all these cases were agreed for law in the case of *Hudson and Maling* (a). [See *S. C. Post*, p. 432.]

What shall be a loss of more than 100*l.* at one time, within the statute of gaming, 16 Car. 2, c. 7.

(a) See *Hill v. Pheasant*, ante, p. 200. *Egebury v. Rossender*, ante, p. 358, and 1 Vent. 253.

[ 422 ]

Semb. *S. C. Anon.* 3 Keb. 629.

( C. 562. )

A QUESTION was, whether a writ of error, before it be allowed, be a *supersedeas in se*? And *Twisden* held that it was, and execution being served, that this Court might grant restitution; but *Wylde* held it was not till the allowance of it; and if it were, that this Court could not properly grant restitution, but the Common Pleas; for the record was not here yet before them (a).

Whether a writ of error be a *supersedeas* before allowance? March, 54.

(a) That allowance is necessary, see 1 Bos. & Pull. 478. 2 *Id.* 370. 2 East, 439. 3 B. Moo. 83.

IRISH v. HILL.

*S. C.* 3 Keb. 613, 629.

( C. 563. )

UPON a judgment given, a *scire facias* went out into the proper county, and upon the return of a *nihil*, a *Testatum ca. sa.* into another county, without any *Capias* into the proper county; and it was held to be error.

Upon return of *nihil*, &c. to a *scire facias*, a *testatum ca. sa.* without a *capias* into the proper county, is error.

Semb. *S. C. Perreivall v. Coltlow*, 3 Keb. 629.

( C. 564. )

DEBT upon a bond for payment of money; the defendant pleaded, that he paid 30*l.* to the plaintiff, which he accepted of in satisfaction of it. The plaintiff replied *quod non acceptavit*; and held no good replication, for the *solvit* is the principal matter; and so it was said to have been held in one *Fennell's* case. [*Pinnel's* case, 5 Co. ?] (a).

Replication to a plea of accord and satisfaction should traverse the payment and not the acceptance.

(a) Either the payment or the acceptance is traversable; *Young v. Ruddle*, 2 Salk. 627. *S. C.* 1 Lord Ray. 60. *Hawkshaw v. Rawlings*, 1 Stra. 23. Com. Dig. Accord, C.

( C. 565. )

*Semb. S. C. Taylor v. Watkinson, 3 Keb. 628.*

Whether a writ  
*de excommuni-*  
*cato capiend*  
may be super-  
seded in B. R.  
on producing an  
appeal (a).

A SUPERSEDEAS was prayed upon a writ *de excommunicato capiend*, upon producing of the appeal under the great seal; and the Court seemed to incline, that it was not proper to move it here, but in Chancery, because the writ issues out there; but the *alias capias* issues out hence, and that they may stop. Nat. Br. 64. E.

(a) *Vid.* 1 Vern. 24. 1 Salk. 293. 1 P. Will. 435. 3 Atk. 479. 1 Stra. 43.

( C. 566. )

LORD SHAFTSBURY *v.* LORD DIGBY.*S. C. T. Jo. 49. 2 Mod. 98. 3 Keb. 631, 641-2-7, 661.*

A peer, called  
as a witness,  
must be sworn.

THE words were, "You are always against the king, and for sedition and faction, and for a commonwealth, and I can prove it, and by God I will have your head the next parliament." The jury gave 1000*l.* damages.

[ \* 423 ]

In this cause the Lord Moore, being to be examined, insisted, that he ought not to be sworn, but to speak upon his honour; and *per totam Curiam*, though a peer cannot be \* compelled to be sworn, yet if he be not sworn, whatsoever he speaks is no evidence; and so he was sworn (a). [*S. C. Post, p. 425-9.*]

(a) *Sir T. Meers v. Lord Stourton*, 2 Salk. 512-3. *S. C.* 1 P. Will. 146. 3 Wooddes Lect. 274-5. That he is also compellable to be sworn, see *R. v. Preston*, 1 Salk. 278.

( C. 567. )

EARL OF SALISBURY *v.* SIR THO. LEE.*S. C. Piggot v. Salisbury, 2 Lev. 154. T. Jo. 68. Pollexf. 146. 2 Mod. 109. 3 Keb. 321, 580, 632, 681, 695-8.*

A. tenant for  
life, remainder  
in tail to B.,  
remainder to C.  
for life, &c. A.  
and C. levy a fine  
*sur concessit*,  
granting *totum*  
*jus et omne quod*  
*habent* to D.,  
*habendum* for  
the lives of A. and  
C. and the sur-  
vivor of them:  
*quare*, whether  
the fine passed  
an entire estate  
in possession,  
and thereby  
displaced the  
remainder in  
tail, or whether  
it passed their

BRIDGET was tenant for life, remainder to B. in tail, remainder to William for life, &c. Bridget and William levy a fine *sur concessit*, whereby they grant the lands *et totum jus et omne quod habent*, &c. to H. *Habendum* for the lives of Bridget and William, and the survivor of them. The only question was, whether or no this fine shall be construed to pass an intire estate for the lives of Bridget and William, and so thereby displace the remainder in tail, or whether it shall be intended only to pass an estate for the life of Bridget in possession, and for the life of William, after the determination of the estate tail, as they might lawfully have granted it?

And it was argued by *Maynard*, that it should pass only such an estate as they might lawfully grant, and should not be construed to pass that which would be a forfeiture of their estates, and displace the remainder; for when words are capable of a double construction, the law shall expound them so as they may stand with right, and not to work a wrong;

as if tenant in tail grant *totum statum suum*, though he hath an estate tail, yet this shall only pass an estate for life, because he can lawfully grant no more. 1 Inst. 331. And he cited 1 Co. 76, *Bredon's case*, and Hob. 277, where a tenant for life joining with tenant in tail, and granting a fee, it shall neither merge nor forfeit his estate; and so 2 Cro. 301. A copyholder covenants that the lessee shall hold and enjoy the land for ten years, though this would amount to a lease in other cases, yet because in the case of copyhold it would work a forfeiture, it is construed to be none; for the law shall never make a wrong by construction. Rastal, 349. 1 H. 7, 22. *Pollexfen* argued, that this did displace the remainder (and then the collateral warranty of the ancestor of tenant in tail would be a bar), and he said this *Habendum* must necessarily import an immediate estate for the lives of Bridget and William, without the intervening of an estate tail; and he said, the fine is a grant of the land, and the *totum et quicquid habent* is by way of addition, as it is ordinarily in conveyances, all right, title, and interest, &c. and the office of the *Habendum* being to explicate and bound the estate, ought \* to be certain in its intendment. 27 H. 8, 24. and *Tey's* [ \* 424 ] case, Coke's Rep. And he cited Dyer, 339. Jones, 59. 2 Cro. 696. 1 Roll. 855.

several estates by fractions (a). Sty. 192.

Pollexf. 146.

And it was agreed by all in this case, that a fine *sur concessit* is a forfeiture after it is executed, as much as a fine *come ceo*, which always supposes either a feoffment or a gift in tail precedent.

A fine *sur concessit* by tenant for life, is a forfeiture when executed (b).

(a) No judgment was ever given in this case, but according to *Pollexfen* the judges inclined to give judgment against the defendant upon the words *totum et quicquid*, &c. in the fine, Poll. 163. i. e. it should seem, that the remainder was not displaced. But in the MS. Treatise on Remainder, published by Gwillim in his edition of Bac. Abr. Lord C. B. Gilbert cites the case and says, that "the better opinion seems, that by the grant of *tenementa predicta* for the life of the husband and wife and the longer liver of them, an estate in possession passes for that time, and that the words *totum et quicquid habent*, &c. cannot be taken by way of restriction to qualify it, so as

to pass only their several estates by fractions, that being a distinct independent clause, and added by way of accumulation to include and take in whatever intent the first words might be thought insufficient to carry, and then the remainder was displaced."—A fine *sur concessit* in the general form above stated would not now be permitted to pass. See *Seymour v. Barker*, 2 Taunt. 198. But see *Ludlow v. Drummond*, Id. p. 84.

(b) See upon this point, 13 Viner, 358. Bac. Ab. in the place cited in the last note. Com. Dig. Forfeiture, A. 2. *Seymour v. Barker*, 2 Taunt. 202. 3 Cruise Dig. p. 260, 2d edit.

*S. C. Tomkins v. Porby*, 3 Keb. 635.

(C. 567 b.)

*CENTUM virgulas panni pendentis*, *Angl'* hangings; it was moved, that it was not good, because there is a proper word for hangings, as *aularum peristroma*.

*Wylde* seemed that it was not good, because hangings is a substantive, and *pendens* is an adjective, and compared it to the case of *duodena fili*, *Angl'* dozen of thread, which was held naught in parliament, because *duodena* was an ad-

Bad latin. *Vid. ante*, p. 54, 357. *Post*, p. 436. Cro. Eliz. 754.

jective; but to that *Jones* and *Twisden* said, that here is a substantive, and there was none, and they thought it good. *Adjournatur*.

( C. 568. )

BULL v. PALMER.

S. C. T. Jo. 47. 2 Lev. 165. 3 Keb. 626, 643.

An executor, nonsuited in an action upon an account stated between him and the defendant, for matters between the testator and defendant, shall not pay costs. A plaintiff, who names himself executor unnecessarily, shall pay costs.

EXECUTOR declares in debt upon an account made betwixt him and the defendant, for matters betwixt the defendant and the testator; and being nonsuit, the question was, whether or no he should pay costs?

*Wylde* inclined, that he should, for though the ground of the account be for matters in the testator's lifetime, yet the account being made with himself, must needs be within his knowledge, and therefore if he brings an action without cause of such matter, it is fit he should pay costs; and therefore in trover, the conversion being alleged in the time of the executor, he shall pay costs. [Cro. Car. 29, 219.]

But the other three Judges were of a contrary opinion; but they agreed the case of trover, because there the plaintiff need not at all mention that he is executor; but *Twisden* said, he had always taken this for a rule, that where the plaintiff cannot declare, but he must needs allege himself to be executor, there he is not a plaintiff within the statute to pay costs; and here in this case, if he should declare generally upon a *computasset*, he must be nonsuited (1), and what he recovers in this action shall be assets, and so *per* three justices he shall pay no costs (a).

(1) *Vid. post*, p. 538.

(a) *Cont. per Treby*, C.J. in *Nicholas v. Killigrew*, 1 Ld. Ray. 436. But the case seems to be good law. The latest cases on this head are *Cowell v. Watts*, 6 East, 405. *Hollis v. Smith*, 10 East, 293. *Tattersall v. Groote*, 2 Bos. &

Pull. 253. *Grimstead v. Shirley*, 2 Taunt. 116. *Thompson v. Stent*, 1 Id. 322. *Barnard v. Higdon*, 3 Barn. & Ald. 213. *Jones v. Jones*, 1 Bing. 249. And see 3 Evans's Statutes, 294-5, note (1). Gwill. Bac. Ab. Costs, (E).

[ 425 ]

( C. 569. )

TAYLOR v. WATTS.

S. C. Joyner v. Watts, T. Jo. 48. 3 Keb. 607, 643.

Administration *durante minori-tate* of several executors determines when one of them attains the age of 17 (a).

ADMINISTRATOR *durante minori ætate* of six brings an action, and avers, that five of them were under the age of seventeen, and the other was about the age of seventeen, but under twenty; and the defendant demurred; and the question was, whether the administration should be determined, according

(a) 1 Sid. 185. 1 Leon. 74. Brownl. 46. *Jones v. Lord Strafford*, 3 P. Will. 87-8. 4 Tyrwhitt's Burn's Eccl. Law. 284. 1 Lill. Prac. Reg. 47, 2d edit. The distinction is between administration granted during the minority of one entitled to administer to an intestate, and during the minority of an infant executor: in the former case, the administra-

tion determines at the age of twenty-one. *Atkinson v. Cornish*, 1 Ld. Ray. 338. *Freke v. Thomas*, Id. 667. S. C. 1 Salk. 39. *Edmund v. Shaler*, Comyn, 159. Bac. Abr. Executors, (B) 3. For the reasons of this difference, see Harg. Co. Lit. 89 b, note (6). As to infant executors, see now the stat. 38 Geo. 3, c. 87.

to *Pigot's* case, 5 Co. 29, before one of the executors arrived to twenty-one, because by the new act concerning administration, the executor is to give bond, and that he cannot do before he is twenty-one; and the Court will not grant administration to him since that statute, and so the testator's debts will not be recoverable; but notwithstanding the Court gave judgment against the plaintiff; and *Wylde* said, though he cannot give bond himself, yet he may be bound by his sureties (b). 3 Keb. 644.

(b) *Sed quære, vid. Freke v. Thomas*, quires a bond only from administrators and not executors. 1 Salk. 39. 1 Lill. Prac. Reg. 47. Besides, the stat. 22 & 23 Car. 2, c. 10, re-

STRANGE v. GREENHILL.

S. C. 2 Lev. 166. T. Jo. 48. 3 Keb. 644.

( C. 570. )

OBLIGATION *in quartoginti libris*, and declares for 50*l.* and upon a demurrer, judgment against the plaintiff. Variance. Ante, C. 456, 281.

Semb. S. C. *Wood v. Withers*, 3 Keb. 646, 650.

( C. 571. )

TRESPASS for taking *bovile*, *Anglicè*, a steer or ox; after verdict it was moved in arrest of judgment, because *bovile* doth not signify a beast, but an ox-stall; but *per Cur'* if *bovile* signifies only an ox-stall, the jury shall be presumed to give damages only for that, and the *Anglicè* void. March, 16. 10 Co. 132. And being trespass will lie for taking an ox-stall, it shall be presumed that damages were given for that. False latin. *Anglice*. Trespass lies for taking an ox-stall.

LORD SHAFTSBURY v. LORD DIGBY.

S. C. ante, p. 422, and post, 429.

( C. 572. )

It was moved in arrest of judgment, that the statute here was mis-recited; for the statute (1) is of dukes, earls, justices, and other great officers of the realm; and they had recited in their declaration *de ducibus, prælatibus, &c. magnis officiariis regni*, and left out the words *et aliis*, which, it was alleged, had altered the whole sense of the statute, for by this means the statute should extend only \* to such as were named before, whereas it extends to several great officers that are not named, viz. Lord Chamberlain or High Constable. But it was alleged for the plaintiff, that it was not necessary to recite the whole statute, but only so much as was sufficient to support the action; as here the plaintiff, being an earl, need not have recited any more but only that it was enacted, that none should speak, &c. *de comitibus*, &c. and then the rest shall be surplusage, and a mis-recital in that shall not hurt. Vid. margin, p. 429. (1) 2 R. 2, st. 1, c. 5. [ \* 426 ] Cro. Eliz. 186. Plo. 105. Hutton, 56.

But on the other side it was said, that although this is a general law, and the plaintiff need not have recited it at all,

3 Keb. 647.

yet if he takes upon him to recite it, and mistakes, it is fatal to him, especially being in a material part. Cro. Car. 135. Dy. 168. *Twisden* seemed to make a difference between a count and a bar, that in a bar you need recite no more than what makes for you, but in a count you must be more certain.

It was moved also, that *contrafacere* according to Lord *Cromwell's* case, 4 Co. was naught, but the Court inclined that that was well enough.

*Et adjournatur.* [Post, p. 429.]

## DE TERM. S. TRIN. 1676.

IN BANCO REGIS.

( C. 573. )

ASTREE v. BALLAD.

S. C. but not S. P. post, p. 444-5.

Venue cannot be changed after plea: nor when an attorney lays a transitory action in Middlesex.

VENUE cannot be changed after a plea pleaded (a), *come semble*. An attorney hath the privilege of laying an action transitory in Middlesex, and the Court will not change the *venue* upon affidavit (b).

(a) 2 Stra. 858, 1162, 1202. Cowp. 409. 3 Bos. & Pull. 12. 1 Taunt. 58. R. M. 1654, § 5, K. B. (b) Acc. 2 Salk. 688. Sayer, 153, 180. 2 W. Bl. 1065. 2 Marshall, 152.

[ 427 ]

( C. 574. )

DUKE OF YORK v. SIR JOHN DANVERS.

S. C. *Brown v. Wait*, 2 Lev. 169. 1 Vent. 299. T. Jo. 57. 2 Mod. 130. Pollexf. 185. 3 Keb. 459, 651, 688, 712.

Whether an estate tail was forfeited by 13 Car. 2, c. 15, [whereby the lands, &c. of persons excepted out of the act of oblivion, were vested in the king]?

Admitting that it was not, whether a fine levied by tenant in tail to the use of himself in tail, &c. should let in the forfeiture? Post, p. 437, note.

SIR John Danvers, father of the defendant, before the 25th day of March, 1646, was seised of an estate tail, and after the 25th of March, 1646, he levies a fine to the use of himself in tail. The question was, whether this estate was given to the king by any words in the act of 13 Car. 2, cap. 15? And two questions were made.

1. Whether there be any words to give an estate tail to the king?

2. Admitting there be not, yet whether or no the levying of the fine, after the 25th of March, 1646, which bars the old estate tail, hath let in this forfeiture to lay hold of it?

To the first point it was argued by *Levinz*, that here are no words to give an estate tail; for lands and tenements are of as large signification as any words here; and these shall not, as it hath been held upon other statutes where there are the same words, viz. 25 Ed. 3, of treasons. 13 R. 2, cap. 2. 16 R. 2, cap. 5. 27 Ed. 3, cap. 5. and so it hath been held upon these statutes. 1 Inst. 130, 393. 11 Co. 13. Bro. For-



feit. 101. And it is to be observed, that the persons named in this act are not attainted by it, nor is the blood corrupted, but their estates are given to the king, as the words of the act do import.

But it is true, that in the statute 26 H. 8, cap. 13, these words, "all lands of any estate of inheritance," have been held to carry an estate tail; 33 H. 8, 20, adds rights and conditions. 5 Ed. 6, 11. Plow. 481.

To the second question he held, that the levying of the fine would not open a way to this forfeiture; for this is not like where tenant in tail grants a rent, or confesses a judgment, or lays any other charge upon the land, and then levies a fine, that shall let in those charges which were laid upon it before; but here was no charge upon the land before, neither is this act an attainder, for then the estate tail would be forfeited by consequence, and though he hath once a fee, it is but *instante*, and the law will not take notice of it. 1 Inst. 31. 3 H. 4. 2 Cro. 615.

Sir *Jo. King* argued for the Duke of York, who was patentee of the lands in question.

1. To the first point he held, that estates tail were forfeited by the words of this statute, although they are general.

\* 2. For the statute *de donis*, which preserves them, hath only general words, as to restrain them from aliening; and a forfeiture hath been expounded an alienation, so as tenant in tail could not forfeit till the statute of 26 H. 8. [ \* 428 ]  
Plow. 260.  
1 Rol. 429.  
Dyer, 343.

This is *in restitutionem communis juris*; for at common law a fee conditional was forfeitable.

3. The statute of 26 H. 8, which is agreed by all to extend to estates tail, hath only general words, and no particular description of an estate tail.

4. Statutes concerning forfeitures shall be construed strongly for the king. Plow. 234. 2 Rol. Rep. 503. 4 Co. *Adams v. Lambert*.

2. To the second point he held, that if the words did not extend to estates tail, yet his levying of a fine hath let in the forfeiture, as it would do charges or incumbrances by tenant in tail. 1 Co. 48. Poph. 132.

For this forfeiture by this act must relate either as an office found to an attainder, as 3 Ed. 4, 25. 1 Inst. 52, b., or else as the attainder to the offence committed. Plow. 488. 1 Inst. 390.

And he held, that when this estate was by the fine conveyed to the conusee, who was seised to his use, that this was within the very words of the statute; and he held, that an instantaneous fee might be forfeited; and cited Moor, 196. *Pym's case*, Cro. Car. 426. 7 Co. *Englefield's case*; and so prayed judgment for the defendant. *Adjournatur*. [Continued, *post*, 436.]

( C. 575. )

## HOLT v. MEDLICOTT.

S. C. R. v. Holt, T. Jo. 51. 3 Keb. 667, 700, 706, 734. Post, p. 441.

When a corporate officer is appointed *durante beneplacito*, the corporation must determine their will under seal. Per Wild, J.

A MANDAMUS being directed to the mayor and burgesses of Abingdon, to restore Mr. Holt to the recorder's place, they returned, that the king by his letters patent gave them liberty to make a recorder *durante beneplacito*. It was said by *Wylde*, that a corporation cannot determine their will but under their corporation seal (a).

(a) Vid. S. C. 3 Keb. 700, 734. But according to Sir T. Jones, "it was answered that the power of election and determination of the will is in the Mayor and Capital Burgesses, who are no corporation (the name of incorporation being Mayor, Bailiffs, and Burgesses) nor have a common seal; and the determination of their will is fully shewn in this, that by them *amotus fuit et existit*." p. 52. And it should seem that the mode of removal depends upon the manner of appointment, and is therefore not necessarily by

an instrument under seal. *Pepis's case*, 1 Vent. 342. S. C. 2 Show. 69. At all events the return to a *mandamus* needs not particularly state it. *Dighton's case*, 1 Vent. 77. *Anon. Ib.* 355. Com. Dig. *Mandamus*, D. 3. R. v. *City of Chester*, 5 Mod. 11; and see *Dean &c. of Windsor v. Gover*, 2 Saund. 365. And the due choice of a successor is a sufficient determination of the will. *Pepis's case*, *supra*. R. v. *Mayor of Canterbury*, 1 Stra. 674.

( C. 576. )

## NELSON'S CASE.

S. C. Ellis v. Ruddle, or Audle, or Nelson, 2 Lev. 151. 3 Keb. 552, 659, 678.

The bailiwick of a liberty is not an office within the 5 & 6 Edw. 6, c. 16.

[ \* 429 ]  
Ante, p. 19.

THE question was, whether the leasing of the bailiwick of the liberty of the Savoy, rendering a rent, be a buying an office within the statute of 5 Ed. 6, 16? And the Court agreed that it was not; for all the bailiwicks of liberties in England are bought and sold; and the marshalsea of the King's Bench, and the under-warden's place of the Fleet, &c. (a).

(a) Acc. *Godbolt's case*, 4 Leon. 33, cited in *Blankard v. Galdy*, 4 Mod. 223. The bailiwick of the Savoy is an office of inheritance, and therefore excepted out of the statute by the 4th sect. 2

Lev. 151. 3 Keb. 553. See the strong remarks of Willes, C. J. upon this case in *Huggins v. Bambridge*, Willes Rep. 241.

( C. 577. )

## WOODWARD v. ASTON.

S. C. 1 Vent. 296. 2 Mod. 94.

An office, granted by deed, is not lost by the destruction of the deed, if it can be proved.

When one entire office is held by two, the surrender or

UPON a trial at bar, in an *indebitatus assumpsit* (a) for money received to the plaintiff's use, the question was, whether or no the office of clerk of the papers was wholly in the plaintiff, or whether the defendant was jointenant with him?

And here it was agreed, that although this is an office that cannot pass but by deed, and the deed be lost or cancelled, yet this doth not destroy the right of the grantee in the office, if the deed can be proved. [Cro. Car. 399] (b).

(a) As to the form of action, see *post*, *Mayor of London v. Gorey*, p. 433. *Howard v. Wood*, p. 473.

(b) There is a doubt in *Ventris* as to cancellation by consent of the parties.

It has been said that in the case of things lying in grant, the destruction of the deed determines the interest of the grantee. *Gilb. Evid.* p. 107-8, ed. 1777. *Bac. Abr. Leases*, (T). And see *Doe v.*

It was also agreed, that if there be two officers in one in-tire office, and one surrender or forfeit, that this redounds wholly to the advantage of the other; for the office being in-tire he cannot grant away his moiety. Plow. *Nevil's case*, 381 (c).

It was likewise agreed, that the officer here can make no deputy; because it is not granted to him and his assigns, or to be exercised *per se vel deputat' suum*; and besides, it is a personal service, and requires knowledge and skill, and none can exercise the office, but he that is admitted by the Court (d).

forfeiture of one redounds wholly to the advantage of the other. The office of clerk of the papers cannot be exercised by deputy.

*Hirst*, 3 Stark. Rep. 61, note (a). But see *Bolton v. Bishop of Carlisle*, 2 Hen. Bl. 259, 263. *Roe v. Archbishop of York*, 6 East, 86, 90-4. *Perrott v. Perrott*, 14 East, 431. *Doe v. Bingham*, 4 Barn. & Ald. 677. 13 Viner, 43.

(c) The grant in this case was to the

two, and the longer liver of them. See Vent. and Mod. Rep. And see Bro. Office, pl. 51. Crompt. Courts, 161 or 116.

(d) See *R. v. Lenthal*, 3 Mod. 150. Com. Dig. Officer, D. 1, 2. Bac. Ab. Offices, (L). *Claridge v. Evelyn*, 5 Barn. & Ald. 87.

### LORD SHAFTSBURY v. LORD DIGBY.

(C. 578.)

S. C. ante, p. 422-5.

In this cause *Rainsford* delivered the opinion of the whole Court, that the plaintiff ought to have his judgment.

For the objection *contrafacere*, it is used in *Rastal's Entries* upon the same occasion; and in the Lord *Cromwell's* case, 4 Co. and it is used for counterfeiting in the case of money and of deeds, and though it be not a word in the dictionary, yet it is a word that the law takes notice of, and is well enough.

*Contrafacere* is good law-latin for to devise. (See stat. 2 R. 2, st. 1, ch. 5.) Plaintiff needs not recite more of a statute than makes for himself; and the misrecital of an immaterial part shall not vitiate, although he concludes *contra formam statuti predicti*. T. Jo. 50.

2. As for the misrecital, it is well enough; for the plaintiff hath truly recited so much as concerns his purpose to ground his action upon; and if he had recited no more, it had been well enough; and he said, there is no difference betwixt this and *Blomer's* case, A. D. 1649, upon the statute of *Winton*, against the hundred of ——— for a robbery, and recites the statute of 13 Ed. 1, cap. 1, sess. 2, according \* to the printed statute, which is "burning of houses," whereas the roll is "Arsons," and not "Arsons de measons," yet being his action was brought for a robbery, and he had recited that part well enough, the plaintiff had his judgment; and so is the case of *Dive* and *Manningham*, that a man need recite no more than makes for his case; and the conclusion *contra formam statuti predicti* is well enough; for each clause, viz. of earls, barons, &c. is a several statute as to those respective persons; and so he gave judgment *in nomine totius Curiae pro quer' (a)*.

[ \*430 ]

Plow. 61.

(a) The statute being general was recited unnecessarily. S. C. 2 Mod. 99. Yet however needless the recital may be, the conclusion *contra formam* &c. with a *predict'* generally engages the party to an exact recital. 1 Lutw. 140. Dougl.

97. 6 Term Rep. 771-6. See further on this point. Com. Dig. Action upon Stat. I. Bac. Ab. Stat. (L). 5. Bull. Ni. Pri. 4. Evans's note on *Mills v. Wilkins*, 2 Salk. 609, and ante, p. 19, 75, 311.

( C. 579. )

SIR WILLIAM SOAMES v. SIR SAM. BARNARDISTON.

Continued from p. 390.

Action on the case lies not against a sheriff for making a double return to a parliamentary writ.

*Ante*, p. 15-6.

In parliamentary elections the sheriff is a judge. 12 Co.

6 How. State Tri. 1099.

6 How. State Tri. 1104, 1105.

*Ante*, p. 380.  
6 How. State Tri. 1095, 1106.

[ \* 431 ]  
*Ante*, p. 382, 390.

THIS case coming to be argued at Serjeants Inn before the Judges of the Common Pleas and Barons, the judgment given in the King's Bench was reversed. *North, Mountague, Wyndham, Littleton, Thurland* and *Barton*, were of opinion to reverse it; *Atkins* and *Ellis* being of opinion to affirm it (a).

The chief reasons were,

1. The sheriff in this case is a judge; for it is matter of judgment whether the voters have an estate in value, whether they are resiants, &c. and action of the case lies not against a judge for giving his judgment, though he be in an error, because they should be free, and have nothing to awe them with in giving their opinions (b).

2. A double return is a legal act, when the matter is doubtful, that it may be left to the judgment of the parliament to determine.

3. This course is inconsistent with those acts of parliament that relate to these matters; for if the party grieved neglect to bring his action for the 100*l.* upon the statute for three months, then it is an action popular, and any body else may sue for the 100*l.* and afterwards the party grieved may bring his action upon the case, and so the sheriff should be twice charged; for the recovery by a third person can be no bar to his action.

4. The sheriff in this case cannot take security from the party, as he may in other cases upon returns; and this differs from the common cases of sheriff's returns; for in some cases he may mend his return; in some impanel a jury; in some pray the direction of the Court, and pray time; but here he must make a quick return without any of those advantages to himself.

\* 5. The novelty of this action, it being *primæ impressio- nis*; and if ever any action would have lain, it would certainly have been brought before this time, according to *Littleton* upon the statute *Si patres conquerantur* (c).

(a) See argument of *Ellis*, J. in 6 How. State Tri. p. 1070; of *Atkins*, J. *Ibid*, p. 1074; and of *Ld. C. J. North*, *Ib.* p. 1092, and in the Harg. MSS. Brit. Mus. numb. 339, pl. 4, in *Ellis's Catalogue*.

(b) See 6 How. State Tri. p. 1096. But see *Atkins's Arg.* *Ibid*, p. 1090, and the different opinions in *Ashby v. White*, 2 *Ld. Ray.* 941, 943, 947, 950. 1 *Salk.* 20. That the office is ministerial, see *Com. Dig. Viscount*, C. 4. *Bac. Ab. Court of Parliament*, (D). 3. *Schinotti v. Bumsted*, 6 *Term Rep.* 649, *per Kenyon*. That his duties are partly ministerial and partly judicial, see *Cullen v. Morris*, 2

*Stark.* 587, *per Abbott*, C. J., and *Ld. C. J. North's Arg.* 6 How. State Tri. 1096-7. The same point is discussed in *Heywood's Dig. of Law of County Elections*, p. 472, *et seq.* 2d edit.

(c) On the argument of novelty, see 6 *State Tri.* 1071, 1086, 1107-8, 1115. *Ashby v. White*, 2 *Ld. Ray.* 944, 957. *Harg. Co. Lit.* 81 b. n. 2. *Chapman v. Pickersgill*, 2 *Wils.* 146. *Lecaux v. Eden*, *Dougl.* 602. *Russel v. Men of Devon*, 2 *Term Rep.* 673. *Pasley v. Freeman*, 3 *Term Rep.* 63. *Birkley v. Presgrave*, 1 *East*, 225-6. *Duke of Newcastle v. Clark*, 8 *Taunt.* 621.

6. The whole subject matter of it relates to and concerns the parliament, and the conusance of it relates to the parliament, though in some cases the Judges may determine some matters relating to parliament; as what shall be said a session, and what an act, &c. (d).

When the judges may determine matters relating to parliament.

7. Another reason is, because the sheriff is not admitted in this case to give any evidence in contradiction to the judgment of parliament, which he was not a party to.

8. Here was no legal damage; for the delay was by reason of the parliament's consideration, and not by reason of the sheriff.

And if the nature of the thing will not bear an action, the addition of *falso et malitiose* will not do it.

And he took this difference concerning actions upon the case, viz. where a man is compellable to do an act, and so errs in it, there an action will not lie; but if a man voluntarily puts himself upon such an act as is prejudicial to another person, there he shall have his action; and upon this difference it is,

An injury, occasioned by error in a voluntary act, is actionable: *secus*, if the party was compellable to do the act (e).

That it lies not against an indictor, because he is upon his oath; he thrusts himself not into the matter; but against a prosecutor it doth, because he comes in voluntarily.

And so it lies not against a judge, because he is bound to give his judgment; and so it is of a justice of peace, when complaint is made to him; but if a justice of peace will, without any complaint, send for a party and imprison him, *falso et malitiose*, there an action lies against him, as well as against any other.

Besides, some things in their own natures are not actionable; as it lies not against a lord for refusing to admit a copyholder, nor against a man for a breach of trust: it lies not against a witness that gives evidence, by alleging that he did it *falso, malitiose, et scienter*. Hutt. 11.

When a thing is in its nature not actionable, the addition of *falsely, maliciously, or knowingly* will not make it so.

And to say that he did it *scienter* would not help it; as to allege, that a judge, knowing the law to be clear for him, did delay him, or give his opinion against him; or that a bishop, knowing his patron's title to be clear, did refuse to admit without a *jure patronatus*; indeed in some cases *scienter* is material; as in case of a dog for killing sheep, or keeping his servant or his wife; but in those cases, if it be proved in evidence, that the party \* had notice of it given him by any body, he must take notice at his peril, though he doth not be-

*Ante*, p. 16, 328. 6 How. Stat. Tri. p. 1072, 1099, 1113. 2 Show. 2. 2 Barn. & Ald. 476. When *scienter* is material (f). [ \* 432 ] 6 How. State Tri. 1114.

(d) See further, 6 How. State Tri. p. 1082-6, 1101-9, 1116. 2 Salk. 503, 512. *Ld. Shaftsbury's case*, *post*, p. 453. *Benyon v. Evelyn*, Judgments of Sir O. Bridgman, by Bannister, p. 324, and the arguments in *Burdett v. Abbot*, 14 East, 63, 88, 161, as to *direct* and *incidental* conusance of such matters.

(e) See *S. C.* 6 How. State Tri. 1107, 1113-4. *Moravia v. Sloper*, Willes, 34.

*Drewe v. Coulton*, 1 East, 564-6, notes. *Sutton v. Clarke*, 6 Taunt. 29. *S. C.* 1 Marsh, 429. And see the words of *Twisden* in *Bradbourne's case*, *post*, p. 435.

(f) See Com. Dig. Action on Case for Deceit. F.3. *Post*, p. 534, C. 722. 1 *Ld. Ray.* 606. 2 *Espin. Rep.* 482. 2 *East*, 446. *Peake N. P. C.* 55. 3 *Black. Com.* 142.

lieve it; for there he may easily prevent this mischief, by turning away the servant, or hanging the dog. But here the sheriff cannot have such certain knowledge, for one party may tell him such a man is duly elected, and another that another.

Another thing alleged was, that this is a mischief that can never happen but in parliament time; and then they may punish the sheriff for it, if he misdemean himself.

And upon these reasons the judgment was reversed (g).

(g) It is said that Ld. C. J. *Vaughan*, and Ld. C. B. *Turner*, (who were both deceased at this time), concurred in the opinion of Ld. C. J. *North*, &c. 6 How. State Tri. 1117. After the revolution, upon error in parliament the Lords affirmed the reversal. See the proceedings in State Trials, *supra*. False and double returns are now remedied by 7 & 8 Will. 3, c. 7. The above case is frequently cited in *Ashby v. White*, 14 State Tri. 695, and is confirmed in *Onslow v. Rapley*, 3 Lev. 29. S. C. 2 Vent. 37. *Prideaux v. Morris*, 2 Salk. 502-3. Lutw. 88. And see 3 Wooddes Lect.

208-9. But in *Myddleton v. Wynn*, Ld. C. J. *Willes* expressed an opinion, that the action would lie at common law. Willes Rep. 605-6. S. C. 1 Wils. 127. That there must be an express averment and proof of malice, or of something tantamount to it, see *Drewe v. Coulton*, 1 East 563, n. *Cullen v. Morris*, 2 Stark. 577. *Doswell v. Impey*, 1 Barn. & Cressw. 165, and other cases cited in *Burdett v. Abbot*, 14 East, 59-62. There are some observations upon this case in North's Life of Lord Guilford, p. 100, &c. 2d edit. and in North's Examen.

### ( C. 580. )

### HUDSON v. MALIN.

S. C. 3 Keb. 671.

Where a party loses at one meeting more than 100*l.* altogether, by playing and betting with several persons, it is within the stat. 16 Car. 2, c. 7. *Ante*, p. 200, 358, 421. (1) 1 Lev. 244. *Ante*, p. 201.

It was held in this case, and so adjudged *per Curiam*, that where one plays, and another bets, and a third person loses to them both, and gives a bond for ninety pounds to one, and ninety pounds to the other, that both these bonds were void by the statute, though they were given to several persons, and though one won by betting and the other by playing; for the judges will construe this statute as extensively as may be for suppressing of gaming. A case between *Danvers* and *Thistleworth* (1) was cited by Levinz, when it was held, that if a man had lost 100*l.* and paid it, yet his bond would be good for any sum under 100*l.* But the Court said, that case is not like this, for here bond is given for all (a).

(a) Acc. *Noell v. Reynolds*, 2 Show. 185. *Walker v. Walker*, 12 Mod. 258. *Whitgrave v. Chancey*, 1 Lutw. 180, cited Com. Dig. Pleader, 2 G. 8. But see *contra*, *Dickson v. Pawlet*, 1 Salk. 345. *Stanhope v. Smith*, 5 Mod. 351-2.

### ( C. 581. )

### THE TOWN OF STANLOCK v. BAMPTON IN OXFORDSHIRE.

S. C. 3 Keb. 674.

A poor man settled at A. purchases a copyhold for life, at B., worth 40*s.* a-year: he cannot be prevented from removing thither, nor

ONE Barnes had been long settled at Bampton in Oxfordshire, and afterwards a copyhold estate for life in a cottage worth about 40*s.* a-year in Stanlock came to him, which he purchased. It was held here, that Barnes, if he pleased, might go to his own house, though the value was so small; for the town is not chargeable to maintain him, so long as he hath any thing of his own; and though the yearly value be



but small, yet he may sell it and raise money, if he will; but they all likewise held, that the town of Bampton could not force him to remove thither. And the order that was made by Justice *Atkins* to remove him from his own house to Bampton, where he was last settled, was quashed, this appearing to be the case.

compelled to do so. See 19 Vin. 371-2. 9 Geo. 1, c. 7, § 5.

[ 433 ]  
(C. 581 b.)

*Semb. S. C. Walseworth v. Tewing*, 3 Keb. 673.

IN a case between a town in Hertfordshire and another in Buckinghamshire, it was held, that if a man live in H. for a good time, and then goes to G. and there falls so sick that he is not capable of being removed back to H., though he lie in that condition for many days, this shall acquire no settlement.

A pauper, who cannot be removed by reason of sickness, shall not thereby gain a settlement. See 35 Geo. 3, c. 141. 10 East, 25.

HARVEY v. JACKSON.

S. C. 3 Keb. 673.

THE defendant was bound to deliver ten quarters of corn to the plaintiff at or before such a day; and he pleads, that he tendered it to him at such a place before the day, and none would receive it, and doth not say that he went to him before to know where he would receive it, and tendered it accordingly. 1 Inst. 210 b. And it was held no good plea.

When no place is fixed for the delivery of goods to the plaintiff, the defendant, who pleads a tender, must shew that he first applied to him to appoint the place (a).

(a) 12 Mod. 421, 422. 20 Viner, 185-7. *Ante*, p. 93-4.

MAYOR OF LONDON v. GOREY.

S. C. 2 Lev. 174. 1 Vent. 298. 3 Keb. 677, 684.

INDEBITATUS *assumpsit* questioned whether it would lie for the duty of scavenger? And the Court inclined that it would; and they said, that if a man receives my rents, and claims them as his own, I may have debt against him for it; and they cited the case of *Aston* and *Woodward*, where an *indebitatus assumpsit* was brought for the receipt of the profits of an office of clerk of the papers (a).

*Indebitatus assumpsit* lies for money due by the custom of London for scavage. *Post*, p. 478. *Ante*, p. 429.

(a) *Vid. post*, *Howard v. Wood*, p. 473. 95. *Mayor of Nottingham v. Lambert*, *Barber Surgeons v. Pelson*, 2 Lev. 252. Willes, 118. *Seward v. Baker*, 1 Term *Shuttleworth v. Garnet*, 3 Lev. 262. S. C. Rep. 616. *Grant v. Astle*, Dougl. 729. 1 Show. 35. *Exeter v. Trimlet*, 2 Wils.

S. C. *Allen v. Rescous*, 2 Lev. 174.

(C. 584.)

ASSUMPSIT. In consideration of two guineas given him, he promised him three if he did not beat J. S. out of the pound before such a day. Judgment was arrested, because the Court will discourage such unlawful acts (a).

No action lies on a wager, that the defendant would beat a third person.

(a) See Winch. 49. Hutton, 56. *Boulter v. Clerk*, Bull. Ni. Pri. 16. *Webb v. Bishop*, Id. 132. 1 Hawk. c. 60, § 26. *Post*. C. L. 260. Com. Dig. Pleader, 3 M. 18. *Brown's Entries*, Part 2, p. 145. *Hunt v. Bell*, 1 Bing. 3.

## DE TERM. S. MICH. 1676.

IN BANCO REGIS.

( C. 585. )

DAY v. CAUDREY.

S. C. Day v. Garely, 3 Keb. 710.

An executor is not personally liable on a promise, if he takes on himself the administration, to pay the testator's debt.

THE defendant being executor to a debtor of the plaintiff did promise, that if he did take upon himself the administration, he would pay him his debt; held no consideration, being moved by *Holt* in arrest of judgment. [1 Rol. 24.]

(a) *Ante*, p. 409. *Post*, p. 464.

( C. 586. )

A declaration, entitled generally of the term, and stating a trespass done after the first day of term, is bad on arrest of judgment.  
Cro. Car. 102.

TRESPASS; the plaintiff declares in Easter Term for a trespass done the 18th of April; and it was moved in arrest of judgment, because the term beginning the 12th of April, the declaration shall relate to that time which was before the trespass done; and it was held to be naught; but *Twisden* said, the verdict might have helped it if it had been special, to find the trespass done before. And the same day a case was moved in ejectment, where the plaintiff declared of an ejectment after the time of the declaration (a).

(a) See Com. Dig. Action, E. 1 Term Pri. 137-8. 1 Vent. 135. 2 Maul. &amp; Selw. Rep. 116. 7 Term Rep. 474. Buller Ni. 232. 1 East, 133.

( C. 587. )

SMITH v. ABEL.

S. C. T. Jo. 65. 2 Lev. 202. 3 Keb. 687, 733.

Tenant for life levies a fine

[ \* 435 ]

come ceo, &c. to remainder-man for life: *quare*, are both the life estates forfeited?

B. TENANT for life, the remainder for life to C., remainder in fee to A. B. levies a fine *come ceo* to C. The question was, whether this were not a forfeiture of \* both their estates. *Vide* 1 Roll. 852. 1 Inst. 252. 9 Co. 106. Ow. 243. It was argued *pro* and *con*. *Sed Curia adv. vult.* *Garrett* and *Blizard's* case. [1 Roll. 855] (a).

(a) Both are forfeited. S. C. 2 Lev. 202. That the acceptance of a fine by tenant for life is a forfeiture of his estate, though it does not divest or disturb any subsequent remainder or reversion, see

*Green v. Proude*, 1 Mod. 117. 1 Vent. 257. 1 Saund. 319, a. b. in the notes. Butl. Fearne's Cont. Rem. p. 323. 1 Prest. Convey. p. 202, 3d edit. 5 Cruise Dig. 259, 260, 2d edit.

( C. 588. )

BRADBOURNE'S CASE.

S. C. Bradborn v. Reading, 3 Keb. 687, 736.

*Quere*, V ther an officer can justify under a decree of the commissioners of sewers, which has been vacated?

It was moved by Mr. *Solicitor* for a trial at bar, because of the matter of law which did arise upon the case, which in effect was this:

Bradbourne was collector upon a decree made by the commissioners of sewers, which being removed into this Court was adnulled, and the parties upon whom Bradbourne had

levied monies brought their actions against him. The question was, whether he was liable to the actions, for although the decree was adnulled afterwards, yet it was in force when he levied the money?

And it was compared to one *Turner's* (a) case, in which *Twisden* said he was counsel, which was, that an action was brought against one that came in aid of the sheriff to serve an execution upon a judgment, which was afterwards vacated upon the secondary's certificate, that it was irregularly obtained; but *Twisden* said, that was a hard judgment, as he always thought; but the reason of it was, because that it did not appear that the defendant came in aid upon the command of the sheriff; but for all that appeared, he voluntarily thrust himself into it, and he said the action would not have lain against the sheriff; but Sir *Francis Winnington* said, that the reason was, because the judgment being irregularly obtained, was now as though it never had been, and was void *ab initio*; but if it had been an erroneous judgment, and so only voidable, no action would have lain, upon the reason of *Dr. Drury's* case, 8 Co. 143. *Ante*, p. 431, and note (c) *ib.*

The Court directed to have the matter tried in the country, and the special matter to be found.

(a) *S. C. Turner v. Felgate*, 3 Keb. 687. Black. 847. *King v. Harrison*, 15 East, 1 Lev. 95. But the action in that case was against the party and not the officer. See Bull. N. P. 84. *Perkin v. Proctor*, 2 Wils. 353. *Parsons v. Lloyd*, 2 W. 615, n. (c). *Woolley v. Clark*, 5 Barn. & Ald. 746; and the cases referred to in note (b) to *Webb v. Batcheler*, *ante*, p. 396.

(C. 588b.)

It was said by the *Attorney General*, that no writ of error lies upon a judgment given upon the statute of Winton.

*Semb. S. C. Syms v. Collier*, 3 Keb. 686.

(C. 589.)

Costs were moved for, for not going on after notice given of executing a writ of inquiry; and the Court said it was a case *primæ impressionis*, and therefore they \* would consider of it: and *per Twisden*:—The Court gives costs for not going on to trial, *per le stat.* 8 Eliz. 2. which gives the defendant costs where the plaintiff delays (a). Costs for not proceeding to execute a writ of Inquiry. [ \* 436 ] 1 Vent. 305.

(a) See *Shadford v. Houstoun*, 1 Stra. 317. *Sutton v. Bryan*, 2 Stra. 728.

## DUNVELL v. BULLOCK.

(C. 590.)

*S. C.* 2 Lev. 177. 1 Vent. 304. *Post*, 446.

**TROVER** *pro quodam ferramento, Anglicè*, an iron range; moved in arrest of judgment *per Levinz*, because there is a proper latin word for a range; for a range and a grate are all one, and *crates* is proper; but the Court inclined, that it was well enough, because there was no proper word for a range. *Style*, 313. *Ante*, p. 424,

( C. 591. )

DUKE OF YORK v. SIR JO. DANVERS.

Continued from p. 428.

*Vid. marg. ante,*  
p. 427.THIS case was argued again by *Walop* and Sir *Francis Winnington*.*Walop* argued, that the estate was not given to the king by these general words; for *hereditaments* here is the only extensive word, and this doth not imply inheritances, but such things as may be inherited, and he cited *Plow. 560. 3 Inst. 19. Hob. 340. 11 Co. 63. 3 Co. Doughty's case.*And to the second point he argued *prout Levinz ante*, and cited *2 Roll. 472. Cro. Car. 123. Jon. 160.* He said this instantaneous seisin was but by fiction of law, and the law will not create fictions to occasion forfeitures by penal statutes, which ought to be taken strictly, and not extended by equity.*Winnington*, Solicitor-General argued *à contra*.

And he said this act of 13 Car. 2, c. 15, proceeds in this method:

1. It describes the things that are to be forfeited.
2. The estates in those things, viz. hereditaments, leases, &c.
3. Rights and conditions, which are mediums to acquire things.

And he said it would give great light into the matter to observe the series of times, and the making of the several statutes that were chiefly concerned in this case.

[ \* 437 ]

In Hen. 3, and King John's time, the barons being often in rebellion, and so by that means liable to attainders and forfeitures of their estates, King Ed. 1, who was a \* wise prince, in the 13th year of his reign assented to the statute *de donis*, which by construction did preserve estates tail from forfeiture, which before that statute were but fees conditional, and *post prolem suscitata* were as well forfeitable as alienable; but after this statute they continued neither forfeitable nor alienable till 12 Ed. 4, when the invention of common recoveries began to shake them as to the alienation of them. And then the differences between the house of York and Lancaster being reconciled by the marriage of Hen. 7 to the daughter of Edw. 4, in the fourth year of his reign came in the statute of fines; but yet they were not forfeitable for treason until this statute of 26 H. 8, when the wars being at an end, and Hen. 8 having both rights in him, they were not like to revive, and so there was not that danger of forfeiture as was before.

And this was the first time that they were forfeitable at all, and from hence he did infer, that although before this time statutes that had general words, as the statute of *præmunire*, were not construed to extend to estates tail, because they were not forfeitable; yet since they are made forfeitable by that statute, they may be comprised in general words,

and he cited 1 Inst. 130. 2 Inst. 334. 2 Roll. 503. 7 Co. 37. *Nevill's case*.

And to the second point he argued *ut* Sir Jo. King *supra*; and cited Plow. 104. 1 Co. 48. 7 Co. 9. 1 Inst. 349. 9 Co. 10. 1 Inst. 22. *Curia advisare vult* (a).

(a) Judgment was given upon the first point only, viz. That the estate tail was forfeited by the general words of the statute. The judgment was affirmed upon error in the Exchequer Chamber, and again upon error in Parliament by a very small majority. S. C. 2 Lev. 171. See Hawk. B. 2, ch. 49, § 28.

### CHAMBERLAIN v. AINSWORTH.

( C. 592. )

S. C. T. Jo. 82. 3 Keb. 654, 675, 691.

COVENANT was brought in London, and a breach assigned for hindering him from digging in mines, that the defendant leased to the plaintiff in Lancashire; the defendant pleads covenants performed; the plaintiff replies, that the defendant did inclose the mines in the county of Lancaster, and issue being taken upon that, and tried in London, it was moved in arrest of judgment, because the trial was in a wrong county; and the question was, whether or no it were helped by the statute of the 16 & 17 of this king, cap. 8? And *Wylde* and *Twisden* held, that it was not; for then by this means they might draw all causes out of the counties palatine; and this action was as much local as might be; and because it was said the \* judges had otherwise resolved in the [ \* 438 ] Common Pleas, *advisare volunt*.

*Quære*, whether a trial in wrong county is helped by 16 & 17 C. 2, c. 8? See *ante*, p. 33, 192, 410.

### HATTON v. READ.

( C. 593. )

S. C. 2 Mod. 25. Pollexf. 399. 3 Keb. 692, 745.

B. HAD issue two sons and two daughters, and he devises the lands in question to his second son, upon condition that he should pay five pounds a-year a-piece to his two daughters, to be paid quarterly during their lives; and by a special verdict in ejectment it was found the lands were of the value of eighteen pounds *per annum*. And the question was, whether the second son by this devise had a fee, or for life? And it was adjudged in the Common Pleas, that he had a fee; and a writ of error was brought here upon that judgment.

A devise of land, on condition of paying a sum of money annually for another's life, passes a fee: *secus*, if the payment is to be made out of the profits of the land.

It was agreed, that if the five pounds *per annum* had been to have been paid out of the profits of the land, that it would have been but for life; for there the devisee could have been at no prejudice.

But here he was to pay it during the lives of the two daughters, and they might survive him, and so he might pay more than the value of his estate, if it should be for life only. But the argument was deferred, because the judges had no books (a).

(a) *Ansley v. Chapman*, Cro. Car. 157. *ers*, T. Jo. 107. S. C. 2 Show. 49. *Baddeley v. Leppingwell*, 3 Burr. 1533. *Roake v. Lea*, post, p. 479. *Lee v. With-*

*Goodright v. Allen*, 2 W. Black. 1041. *Ibid.* 292. *Randall v. Tuckin*, 6 Taunt. 410. *S. C.* 2 Marsh. 113, and 6 Cruise's note (a), *ibid.* *Goodright v. Stocker*, 5 Term Rep. 13. *Andrew v. Southouse*,

( C. 594. )

PRICE v. DAVIES.

S. C. 1 Vent. 317. 3 Keb. 693-4, 815, 830.

What degree of certainty is necessary in trover.

TROVER and conversion *pro decem juvencis, Anglicè*, bullocks and heifers. In a writ of error moved to be ill; because it is not ascertained how many bullocks and how many heifers. And a case was cited by *Wylde*, where it was *pro viginti ovibus matricibus et vervecibus*, and doth not say how many of each sort; and held to be bad.

The Court inclined that it was naught; but if it had been 10 *juvencis* it would have been good enough, for then it should be intended in the masculine gender; but here the reason why it is bad is, because the defendant cannot tell how to prepare himself for his defence, unless he had set forth how many bullocks and how many heifers.

*Viginti averiis* they held was naught. But *per Twisden*, if it proceed and say, viz. *ovibus, juvencis, &c.* it is good enough, for it shall be intended twenty of each. Hil. 24 Car. Rot. 452.

[ \* 439 ] \* *Navi cum apparatu, Anglicè*, the tackle, &c. good enough, for it shall be intended the tackle and furniture belonging to that ship.

Another exception was taken, because it was *pro 10 numeris straminis, Anglicè*, thraves of straw, whereas he ought to have made a word, if there had been no latin word for it, and not have taken a latin word that had another signification.

1 Mod. 289. But that the Court inclined might be well enough, because there was no latin word for a thrave. *Vide le case de Web v. Wagstaff*. At last the business was composed, and so no judgment given (a).

(a) *Vid. ante*, p. 54, 121, 357, 424, 436. *Post*, p. 442, 446, 447.

( C. 595. )

Quere, S. C. Cockman v. Samson, 3 Keb. 664?

Forbearance to sue for a debt, due from a person deceased, is a good consideration for a promise by a stranger to pay it: and where the promise is to pay generally, no request is necessary.

A. WAS indebted to B., and A. dies, and after B. comes to C. and demands the money, and C. in consideration that B. would forbear his debt, (or to sue), did promise to pay him.

*Obj.* The defendant demurred to the declaration, because the plaintiff had not averred, that the defendant was executor or administrator, or that any goods came to his hands, and so did not appear to be chargeable; and then there was no consideration.

But to that it was answered *per Curiam*, that the consideration is good enough; for here it is to forbear generally, and that must be intended a forbearance of all persons; but



otherwise it had been, if it had been to forbear the defendant (a). 1 Rol. 18.

Another objection was made, that this being a collateral promise, and no debt due from the defendant, here ought to have been a request.

But to that the Court answered, that a request was not necessary, the promise being generally to pay, and not upon request (b). Owen, 109.

(a) See 1 Rol. Ab. 22, 27. 1 Sid. 242. 1 Lev. 161. Yelv. 184. Com. Dig. Action upon *Assumpsit*, B. 1. *Anonymous*, ante, p. 66. *Porter v. Bille*, p. 125. *Gadbury v. Day*, p. 161. But the declaration must make it appear that there

was some one liable to be sued at the time of the promise. *Jones v. Ashburnam*, 4 East, 455. *Marshall v. Birkenshaw*, 1 New Rep. 172.

(b) *Cont.* 3 Keb. 664. *Vid. Ashenden v. Clapham*, ante, p. 113, and note *ibid.*

### SIR JEREMY WHICHCOTT'S CASE.

( C. 596. )

*S. C. Plummer v. Whichcot*, 2 Lev. 158. T. Jo. 60. 1 Vent. 314. 2 Mod. 119. 3 Keb. 591, 656, 701, 754, 758, 773. Lev. Ent. 56.

He having the office of warden of the Fleet in fee, granted it to one Duckingfield for life, who suffered a prisoner that was in execution for debt to escape; and an action of debt was brought against Sir Jeremy Whichcott; and this matter found upon a special verdict. *Vid. marg. post*, p. 449.

\*And the great question was, whether or no the reversioner in fee should be chargeable for escapes suffered by the officer for life? [ \* 440 ]

And it was argued by *Wallop pro quer'*: and he observed, where one man should be charged for the acts of another officer, who executes the office as it were by his privity, and so he is esteemed his superior. 2 Mod. 119-122.

1. Where a man is elected to an office, the elector is esteemed a superior. 4 Inst. 114. 2 Inst. 175.

2. Where a man is recommended to an office. 11 Co. 92. [But that Mr. Attorney answered was by the king's prerogative only.]

3. Where an officer is dependant upon another. 9 Co. 98. 5 Co. 48. Cro. Eliz. 386. Poph. 119. 2 Inst. 382. It appears, that by the common law the superior was to answer for his deputy. 2 Inst. 466.

And he compared it to the case of *Mosse and Slow* (1), where it was held, that in case of a ship, if the master was insufficient, the owner was to answer for it; which case was lately adjudged in this Court. (1) *S. C.* 1 Vent. 190, 238. 2 Lev. 69. T. Ray. 220. *Vid. post*, p. 449.

Mr. Attorney argued *pro def'*:—And he argued, 1. Admitting that the tenant for life were a deputy within this statute, yet the action of debt was not an action within the meaning of the statute of Westm. 2; for if it were, then the statute of 1 R. 2, 12, was made in vain. Plow. 35. Bro. Escape. 2 Mod. 123-7.

And it is plain, that several parts of this statute do not

extend to actions of debt; but as the statute *de donis* is called the statute of the great men; so this statute of Westm. 2, cap. 11, may well have that name, in as much as it doth chiefly concern great men and their accounts with their bailiffs.

By this statute the lords might appoint their own judges for accounts, and the party had no remedy but his writ *ex parte talis*; but no man will say they may do so in an action of debt.

2 Inst. 381.  
3 Inst. 34.  
10 Viner, 84.

By this statute, a man that was committed by the Auditors might be kept in irons; but so ought not a man that is in execution for debt, unless upon an endeavour to escape, or some other misdemeanor.

By this statute, if a man committed for an account made his escape, the gaoler was liable; but in other cases the sheriff is chargeable, as appears by 3 Co. *Westbye's* case.

[ \* 441 ] \* 2. But he held, the reversioner in this case is not a superior; for there be several other cases where the word may have its proper effect, and therefore shall not be strained to an improper signification; as a sheriff is superior to a gaoler, a lord of a liberty to his bailiff; but if a bailiff in fee should grant his bailiwick for life, he that had the fee will not be superior, but the lord; for otherwise there will be two superiors, and then it would be uncertain which the statute means. 20 Ed. 4, 6. 38 Ed. 3, 25.

And he said, that the case in Cro. Eliz. 386, was reported contrary by Moor, pl. 587, where the same case is reported.

And he said, if the reversioner in this case be chargeable, it is either by reason that he puts in the tenant for life, and then, if this tenant for life should grant over to another, he must be chargeable, because he puts him in;

Or else it must be by reason of the estate that he hath in him; and then the consequence of that would be, that the assignee of the reversion *in infinitum* should be chargeable, which would be absurd; for there is no attendance in this case by the tenant for life upon the reversion, for a rent cannot be reserved out of it; as *Jewell's* case, 5 Co.

And though this seems to be the opinion of Lord Coke, 9 Lib. 98, yet no authorities cited by him there do warrant his opinion. And so he prayed judgment for the defendant. [*S. C. post*, p. 449.]

(C. 596 b.)

Bail may render their principal at any time before the return of second *sci. fa.* If on the last day, it must be *sedente curia*. 1 Rol. 334.

BAIL may bring in the principal any time before the return of the second *sci. fa.*, but if it be the last day, it must be (*per Twisden*) *sedente Curia*; for he said, he remembered a case, where the bail brought in the principal as Judge *Bartlett* was going down the hall, and it was too late (*a*).

(*a*) *Wilmore v. Clerk*, 1 Ld. Ray. 156, and the note in Bayley's edit. *Simmonds v. Middleton*, 1 Wils. 269, 270.

## HOLT'S CASE OF GRAY'S INN.

( C. 597. )

See *S. C. ante*, p. 428, C. 575.

THE corporation of Abingdon was by the name of mayor, bailiffs, and burgesses: and a *mandamus* being sent to them upon the account of Mr. Holt, who was removed from the recordership of the town, it was directed to the mayor and burgesses only; and it appearing by the return, that by the king's letters patent they alone had the power of election and amotion, the question was, whether the writ was well directed, or whether it ought not to have been directed to them by the name that they were incorporated by?

And it was argued by the *Attorney-General*, that it was well directed, the power of election and amotion being solely in the mayor and burgesses, and the bailiffs having nothing to do with it; and for that he cited Dy. 333, and one *Estwick's* case, which is in 2 Roll. 456, although that point be not taken notice of; and one Dr. *Patrick's* case, where the writ being directed to the senior fellows was held good, though the college was incorporated by another name.

*Offly* on the other side argued, that it ought to be directed to the corporation; and so he said it was held in *Taylor's* case. 1 Rol. Rep. 409. 3 Bulst. 190.

And *Saunders* said, that although the mayor and burgesses might have the power of election, yet it did not follow that they had the power of restitution.

But *Wylde*, that will follow by implication.

*Twisden*: The king's grant shall not be taken by implication. *Curia advisare vult* (a).

(a) The Court admitted that restitution could not be made on this writ. *S. C. T. Jo. 52.* But according to C. J. *Holt*, (who was son of the recorder mentioned in the above case) "Serjt. Pemberton, Sir W. Jones, and all the learned part of the bar wondered at the resolution." *R. v. Mayor of Abingdon*, 2 Salk. 699. *S. C.*

1 Ld. Ray. 559. And in this latter case, and in *R. v. Mayor of Hereford*, 2 Salk. 701, it was determined that the writ must be directed to the persons who are to do the act required, though they form only a part of the corporation. Acc. *Pees v. Mayor of Leeds*, 1 Stra. 640. Com. Dig. *Mandamus*, C. 1.

The name of a corporation is "the mayor, bailiffs, and burgesses," and the power of electing and amov-

[ \* 442 ] ing the recorder is in the mayor and burgesses only: *quare*, whether a *mandamus* to restore be well directed to the latter only?

*Semb.* Power of restoring a corporate officer is implied in the power of election. *Per Wild, J.*

## HICKS v. PENDERIS.

( C. 598. )

*S. C.* 2 Lev. 176.

TROVER *pro una parcella lintea* was held naught by reason of the incertainty. And *per Twisden*, a pair of hangings had been ruled naught, because none can tell what it means; but a pair of bellows or gloves good enough; and he cited a case between *Green* and *Green*, where it was for six parcels of lead, ruled naught; and judgment was here arrested.

Trover "*pro una parcella lintea*" held bad. *Ante*, p. 357. 1 Vent. 106. Com. Dig. Action upon Trover, G. 1, 2, 3.

( C. 599. )

NORDEN v. LEVEN.

S. C. 2 Lev. 189. T. Jo. 88. 3 Keb. 597, 615, 691, 706, 742, 778.

A stranger, who has goods of an intestate in his possession, enters into articles of agreement with the administrator to pay a certain sum of money and retain the goods: *quære*, whether the administrator be chargeable as for a *devastavit*. 11 Viner, 308.

[ \* 443 ]

A STRANGER having possessed himself of part of the intestate's estate, the administrator enters into articles with him, that he should have the goods, and that he should pay such and such sums of money; the money was not paid at the times, and the administrator sues him, and puts him in prison, where he now is, but could never get the money of him. The question was, whether or no this should be a *devastavit* in the administrator for so much, so that he should be chargeable to the plaintiff as though this had been assets in his hands, though he never had the \* goods in his hands, nor did ever receive the money for them?

And it was argued by *Saunders* that he should; for by these articles he had barred himself of his remedy to recover these goods, and so it shall be all one as if he had released to him that had these goods in his hands, which would certainly have been a *devastavit*.

*Pollexfen e contra*:—for the administrator here hath done that which probably was for the advantage of the intestate's estate; for whereas before it was a thing in action and uncertain, now he hath reduced it to a certain debt due by deed; as if an administrator should take a bond for a debt that was due before by contract only, or a judgment for an obligation, though he never had any fruit of it, yet it would be unreasonable to charge him as for a *devastavit*.

But the Court doubted of it; for they said, this was tantamount to a sale of the goods, in which case the administrator shall be charged, though he never receive the money. *Ideo adjournatur (a)*.

(a) The Court resolved that it was a *devastavit*, and that the administrator should be charged; for the property of the goods was charged by this agreement. S. C. T. Jo. 89. 2 Lev. 190. N. B. The judgment is said to have been affirmed

on error, in *Dom. Proc. Jenkins v. Plombe*, 6 Mod. 94. *Barker v. Talbot*, 1 Vern. 474. See *Miller's case*, ante, p. 284, and note (b), *ibid.* *Farr v. Newman*, 4 Term Rep. 631.

( C. 600. )

IRETON'S CASE.

An inquisition of *felo de se* is traversable. Acc. ante, p. 419.

It was held, that an inquisition found of a *felo de se* was traversable, although my Lord Coke holds the contrary; and it being removed here by *Certiorari*, they were admitted to traverse it.

( C. 601. )

CANSON'S CASE.

Declaration in *assumpsit*, in consideration of forbearance to sue for a debt of "20s. et ultra," held bad, after verdict, for uncertainty. Ante, p. 161.

ACTION *sur le case*, and declares, that whereas A. was indebted to him 20s. *et ultra*, B. in consideration he would forbear it, promised to pay him. After a verdict judgment was arrested, because of the uncertainty of the sum in the declaration.

( C. 602. )

A *PELO de se* kills himself in the manor of A. and hath a lease for years in the manor of B. The question was, whether the lord of the manor of A. or of B. should have this lease, [supposing both had the grant of felon's goods]? And it was said at the bar, that the lord of B., where the land lies, should have it (a).

*Felo de se*, having a lease for years in the manor of B., kills himself in the manor of A. and the lords of both have a

grant of felon's goods: *quærs*, which shall have the lease? 2 Leon. 56.

(a) See *R. v. Sutton*, 1 Saund. 269, 274, a. 272, a., note (1).

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## ASTREY v. BALLARD.

( C. 603. )

S. C. 2 Lev. 185. T. Jo. 71. 2 Mod. 193. 3 Keb. 709, 723.

A LEASE was made of lands, with all mines, profits, &c.; and in the lands were mines, some open and some close. The question was, whether or no this passed the mines not open, so that the lessee might dig? And it was alleged, that although it be *Coke's* opinion, 1 Inst. 54, that they do pass, yet there is no authority that is cited by him, that warrants his opinion; and these cases were cited, *Fitzh. Waste*, 82. 22 Ed. 4, 8. 17 Ed. 3, 7. 2 Roll. 816. *Cro. Eliz.* 683. *Sed adjournatur*. [See *S. C. post*, C. 605.]

5 Co. 12.

## THE KING v. MOOR.

( C. 604. )

S. C. 2 Lev. 179. 2 Mod. 128. 3 Keb. 708, 715.

INFORMATION was preferred against the defendant, for taking away a maid under the age of sixteen years, against the will of the guardian, upon the statute of 4 & 5 Ph. & Mar. [c. 8;] and it was moved in arrest of judgment, that this Court hath not jurisdiction of the matter, because by the statute it is made punishable in the Star-chamber, or before the justices of assise.

An information lies in the K. B. for the forcible abduction of a female, contrary to 4 and 5 P. & M. c. 8.

The information alleged that the defendant, being of (above) the age of fourteen, took her away, &c.: held, that being related to the time of the taking, and not of the information.

But it was resolved, that the King's Bench hath jurisdiction in all matters, unless there be prohibitory words in the act of parliament; and therefore in the case of bastard children, though it be said, that the sessions shall finally determine, &c., yet this Court may quash any orders that they adjudge illegally made, though they cannot make new orders; and wheresoever a statute hath prohibitory words, this Court hath jurisdiction (a).

Another exception was, because that it was alleged that the defendant *existens ætatis 14 annorum* did take her away, and doth not say *tunc existens*, and then *existens* shall relate to the time of the information; as in an indictment for a forcible entry, if it be *existens liberum tenementum* J. S. and doth not say *tunc existens*, it is naught.

*Post*, Case 697, p. 522.

But it was resolved, that this case differed from that, for

(a) *Smith's case*, *Cro. Car.* 465. *Anon. ante*, p. 100, 393, 409. *R. v. Marriot*, 4 Mod. 145. 1 East, P. C. c. 11, § 9.

when it is alleged, that he *existens* of fourteen years of age did take her away, it shall be properly intended that he was of that age when he did take her away (b).

*Inuptam* instead of *innuptam*, good.

[ \* 445 ]

Another exception was, because it was *facminam inuptam* instead of *innuptam*, and that there was no such word as *inupta*. But to that the Court answered it was well enough, \* as *mamilla* instead of *mammilla* in an indictment, and held good.

And the Court overruled all these exceptions; and it appearing that the defendant had carried her away upon a horse before him like a calf, in an unhandsome manner, and that she was worth 10,000*l.*, the Court fined him 500*l.*

(b) *R. v. Boyall*, 2 Burr. 832. *Eaton v. Southby*, Willes, 134.

## DE TERM. S. HIL. 1676.

IN BANCO REGIS.

### ASTREY v. BALLARD.

Continued from p. 444.

( C. 605. )

Under a lease of land, without the word "mines," the lessee cannot open new ones. *Semb.* where mines are mentioned, and there are open ones on the land, the lessee cannot open new ones.

THIS case being now argued by Serjeant *Pemberton pro quer'* the Court seemed to incline to my Lord Coke's opinion, 1 Inst 54, that the mines open only passed, and that the word *mines* would be well satisfied with that. But looking into the case it appeared that the word mines was not in the grant, and then they held it clear, according to *Saunders's* case, 5 Co. that the lessee could not open any new mines, and so gave *jud' pro quer' nisi* (a).

(a) *Whitfield v. Bewit*, 2 P. Will. 242. the purpose of working old mines. *Clavering v. Clavering*, 2 P. Will. 388. New shafts or pits may be opened for

( C. 606. )

### ABRAHAM v. CONYNGHAM.

S. C. 2 Lev. 182. 1 Vent. 303. 2 Mod. 146. T. Jo. 72. 3 Keb. 725.

Administration, granted upon concealment of a will, is afterwards revoked upon the discovery of the will; *mesne* acts and sales by the administrator are void, and are not made good by the subsequent refusal of the executor.

SIR David Conyngham, being possessed of a term for years, makes Sir David his son executor, and dies; young Sir David makes his executor by a will made in Scotland, and dies; the will not being discovered, one Bradbourne takes out administration, and sells the term; afterwards, the will being discovered, the executor refuses,\* and the Ecclesiastical Court revoke the administration granted to Bradbourne, and grant it to another. The question was, whether or no the plaintiff, who was the vendee of the first administrator, had a good title against the second administrator?

*Saunders* argued for the plaintiff; he admitted, that if the executor had not refused, but had taken upon himself the executorship, the first administration had been void *ab ini-*



tio, and so had all sales and gifts made by him, according to the case of *Bracebridge* (1) and *Fox* in Plowden. But when the executor refuses, he is never executor at all, for his refusal shall relate to the death of the testator, for a man cannot be made an executor whether he will or no; and he cited *Isted's* case, Dyer, 372, that if an executor dies before probate, his executor is not executor to the first testator.

(1) *Graysbrook v. Fox*, Plowd. 276.

*Levinz pro def'* argued, that the executor had an absolute interest in the testator's estate before probate, until refusal, and might release debts, or sell any of the testator's goods; and if so, then the administrator could have no interest to transfer till the executor had refused.

36 H. 6, 7. Bro. Justification, 11. Post, p. 520.

2. The ordinary had no power to commit administration till the executor refuses, and *Twisden*, J. cited a case where administration had been committed sixteen years, and a will afterwards found, that all sales and acts done by the administrator were void.

3. This cannot be good by relation, for there is no case, where a party is to do an act by virtue of an authority, and hath not power at the time when the act is done, where it shall be good afterwards by relation (a); and to that effect the *Attorney-General* argued.

An act, void from defect of authority, cannot be made good by relation.

And the Court seemed to incline that the administration, and by consequence the sale of the term, was void till the executor had refused; and that though it were a hard case, after a will hath been long concealed, to avoid all acts done by an administrator, yet the law being so, it might be fit for the parliament to consider of it; but the Court could not alter it. *Adjournatur* (b).

(a) "And the court seemed strongly of that opinion." S. C. 1 Vent. 304. 18 Viner, 292.

11 Mod. 38. S. C. 1 Salk. 299. Com. Dig. Administrator, B. 10. *Allen v. Dundas*, 3 Term Rep. 125. *Mountford v. Gibson*, 4 East, 441. *Woolley v. Clark*, 5 Barn. & Ald. 744. S. C. 1 Dow. & Ryl. 439.

(b) Judgment for the defendant. See the other reports of S. C.; and see 1 Show. 410. *Wangford v. Wangford*,

### DUNVELL v. BULLOCK.

(C. 607.)

S. C. ante, p. 436.

TROVER *pro uno ferramento*, *Angl.* an iron range. Moved in arrest of judgment, because there is a proper word for a range, as *crateuta* or *crateuterium*.

Bad latin cured by an *Anglice*. Ante, p. 54.

\* And *Twisden* said, that *instrumentum ferreum*, *Anglicè* [ \* 447 ] a horse-lock, or a pair of fetters; with an *Anglicè*, had been held good enough; *instrumentum*, *Anglicè*, a pedigree, had been good.

[ \* 447 ] Post, p. 483, C. 662.

*Septem libris* good, without saying what books they were, and so for so many pair of stockings, without saying what stockings.

Ante, p. 357, 438-9.

*Vestitu lineo* was moved to be naught without an *Anglice*, but that was held well enough; and Judge *Jones* said, it might be intended a linen vest.

( C. 608. )

*Semb. S. C. Barton v. Hamshire, 3 Keb. 738.*

Ejectment lies for common appurtenant to the land demanded.

**EJECTMENT** *pro 10 acres de terres et communia pasturæ. Apres verdict et judgment en le Common Pleas un breve de error fuit post icy. Et fuit move per Serjeant Barrell q' ejectment ne gist de communia pasturæ*, although an assise doth, for an assise will lie of a piscary, and so will not an ejectment.

But it was argued on the other side, that although an ejectment will not lie for a common by itself, yet when land is joined in ejectment, it shall be intended appurtenant to that land; to which the Court inclined (a). *Et adjournatur.*

(a) *Acc. Baker v. Rye, C. T. Hardw. 127. Newman v. Holdmyfast, 1 Stra. 54.*

( C. 609. )

**MAY v. TRYE, UN BARRISTER DE GRAY'S INN.**

*S. C. Mayhur v. Try, 3 Keb. 764, 780.*

Defendant covenants by deed, reciting a consideration, to pay an annual sum to the plaintiff; the covenant is good, though the consideration appears to be void.

**DEED** recites, that whereas the plaintiff had assigned over a patent to the defendant, for registering the licences of such as went beyond sea, (which patent in law did appear to be void,) the defendant did covenant to pay 470*l.* *per ann.* for seven years.

It was argued by Mr. *Solicitor*, that it appearing that the patent was void, that the covenants should be void too: but the Court denied it, though they admitted the case of a covenant to pay rent; if the lease be void, the covenant is void too. But they said here the recital of the patent is only the consideration; and if there be no consideration, yet the covenant is good (a).

Yelv. 19, 23.  
1 Rol. Rep. 199.

(a) When a covenant shall be deemed auxillary or dependent, so as to be defeated by the failure of the principal, see *Sacheverell v. Walker, ante, p. 16. Raynolls v. Woolmer, p. 41. Done v. Dr. Barebone, p. 175. Drue v. Baylie, p. 402*; the cases collected in *Bac. Ab. Covenant, (G). Com. Dig. Covenant, F. 6 Viner, 415-6-7. Northcote v. Under-*

*hill, 1 Salk. 199. S. C. 1 Ld. Raym. 388. Johnson v. Wilson, Willes, 254. Mouys v. Leake, 8 Term Rep. 411. Andrew v. Pearce, 1 New Rep. 153. Kerrison v. Cole, 8 East, 231. Wigg v. Shuttleworth, 13 East, 87, and Biddel v. Ledger, 1 Barn. & Cressw. 325. S. C. 2 Dow. & Ryl. 499.*

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DE TERM. PASCHÆ, 1677.

IN BANCO REGIS.

( C. 610. )

**DR. VOSCIUS'S CASE.**

*S. C. Paget v. Vossius, 1 Vent. 325. T. Jon. 73. 2 Lev. 191. 2 Mod. 223. 3 Keb. 638, 749, 779, 842.*

On the construction of the word "exile," where land is devised to one "during his exile."

**DR. Voscius** being a pensionary of the States in Holland, upon some difference the States took away his pension, which was 150*l.* *per annum*, and he was forced to fly into England. Dr. Browne, who was his great friend, by his will devised lands to him "during his exile; and after it should please God,

by his providence, to restore him to his own country, then to the lessor of the plaintiff and her heirs:" After the wars were ended between the Dutch and the English, the plaintiff brings an ejectment; and this matter being found by a special verdict, the sole question was, whether or no Dr. Vossius's continuance here now should be called an exile within the intent of the testator, and so his estate to continue?

And it was argued by *Pemberton pro quer'* that this continuance now seemed to be voluntary, and so could not be properly called an exile, and said, that where an estate is to have continuance till an act be done, and that be proffered to be done, or be in the power of the party who hath the estate to do it, that the estate shall be determined; as where an annuity is granted till the party is promoted to a benefice, if promotion be tendered, although he refuse, yet the annuity is determined.

\* *Holt pro def'*:—Exile is twofold, *exilium voluntarium et compulsarium*; as where a man leaves his country, he is as well exiled as where he is forced to leave it. Calv. Lexicon. [ \* 449 ]  
1 Rol. Rep. 400.

And although it be found here, that the wars be ended betwixt the Dutch and the English, yet this makes nothing to the defendant; and he said, that 1 Inst. 53, b. cited by Serjeant *Pemberton*, makes strongly for him; for there *exile* is no more but a departure of the tenants for being made poor; which is just Dr. Vossius's case, having his annuity taken away from him.

*Twisden, Wylde and Jones*, seemed to incline for the plaintiff; for they said, that now, for all that did appear, his stay here was voluntary; which could not be intended by the testator, that he should have the lands, let him stay here as long as he would; for then these words, "When it should please God of his providence to restore him," could have no signification.

But *Rainsford*, C. J. inclined for the defendant; for that it seemed, that the defendant had the same reason to continue here, as he had at first to come over; for that it is not found that the States would restore him his annuity, nor that they were reconciled to him, but that he might, for all that appeared, lie still under their displeasure; which was the first occasion of his coming here, and which it is plain the testator meant by exile.

But the Court persuaded the parties to a reference; and so it was referred to Serjeant *Pemberton* and the Recorder of London (a).

(a) But judgment was afterwards given for the defendant, by the opinion of the whole court. See the other reports of S. C. In addition to the circumstances above stated, it appears from those reports that Vossius left his country

voluntarily in consequence of the loss of his pension, and that upon the return of peace his pension was not restored to him.—Dr. Vossius had letters of denization to enable him to take by devise. See 2 Mod. and Sir T. Jones.

( C. 611. )

## SIR JEREMY WHICHCOTT'S CASE.

Continued from p. 441.

A. being warden of the Fleet in fee, grants the office to B. for life, who suffers a prisoner in execution for a debt to escape: debt lies against A. But *semb.* it must appear that B. was insufficient at the time of the action brought.

[ \*450 ] Special verdict, when helped by intendment. Com. Dig. Plead. S. 31-2-3-4. Gilb. Eq. Rep. 257. *Ante*, p. 24.

JUDGMENT being prayed for the plaintiff, the Court said, they were all of opinion in this case, that Sir Jeremy was a superior, and liable to the party's action; but the special verdict seemed insufficient; because it found the insufficiency of Duckenfield (who was the lessee) long before, and at the time of the escape, but did not find it at the time of the action brought; and therefore advised the counsel to consider of that point, whether they must not be forced to take a *venire fa' de novo*. *Per quod nota, q' le insufficiency del inferior doit estre* averred and proved. 9 Co. 98. 2 Inst. 382.

Afterwards [it was] argued to make out the special verdict by intendment; and it being found that he was insufficient once, it shall not be presumed after that he became sufficient, unless it be shewn; and cited Cro. Car. 231, and these cases of intendments in verdicts, Moor 447. 4 Co. *Fulwood's* case. Hob. 142. Moor, Lord *Pagett's* case; but the Court seemed that it could not be good, being substance (a).

(a) Levinz says that a new *venire* was awarded for the insufficiency of the verdict and no judgment given, and that the defendant died before the new trial. Acc. T. Jones, 60. 3 Keb. 773. According to Ventris a *nil capiat* was entered, and a writ of error brought. See further on

the subject of this case, *Lodge v. Jennings*, Gilb. Eq. Rep. 257, and *Cross v. Lenthal*, 2 Show. 308. And see Com. Dig. Escape, B. 2, 3. Bac. Ab. same title, (E). 2. *Id.* Offices, (L). 10 Viner, 101, Escape, F. 2. Stat. 8 & 9 Will. 3, c. 27, § 11.

( C. 612. ) *Semb.* S. C. *Gregory v. Major or Mayo*, 2 Lev. 194. 2 Mod. 213. 3 Keb. 744, 755.

In *assumpsit* by a lessee, upon a general promise of quiet enjoyment, he needs not shew that the interruption was under a lawful title.

(1) *Hayes v. Bickerstaff*, Vaugh. 118.

3 Keb. 755.

ASSUMPSIT. The defendant leased land to the plaintiff, and promised that he should enjoy it quietly, without interruption of any person; and the plaintiff shews an interruption, but doth not shew any title in the interruptor, nor any lawful interruption.

And the cases of *Procham* and *Cham*, and *Leigh* and *Golham*, 2 Cro. 425, 444, were cited for the defendant, that the plaintiff ought to shew a lawful interruption, or else the action would not lie; and a case was cited in Vaughan's reports (1), where Dy. 328, was denied.

But yet the Court gave judgment for the plaintiff, upon the authority of Dy. 328, and Hob 35.

And *Wylde* said, that where in a deed a man covenants, that he hath a good right to convey, &c. and that the party shall quietly enjoy, one covenant goes to the title, and the other to the possession (a).

(a) See S. C. 2 Mod. 213, where it is said, that "this being after verdict, and the plaintiff setting forth in his declaration, that the disturber recovered *per judicium curiæ*, the court were all of opinion that

judgment should be given for the plaintiff." It is now settled, that general covenants for quiet enjoyment do not extend to *tortious* evictions by strangers: but it is otherwise, when the covenantor

indemnifies a purchaser against the acts of particular persons by name. See *Lucy v. Leviston*, ante, p. 103. *Bloxam v. Walker*, p. 124, 130. *Hill v. Browns*, p. 142. *Dudley v. Foliot*, 3 Term Rep. 584. *Foster v. Pierson*, 4 Term Rep. 617. *Nash v. Palmer*, 5 Maul. & Selw.

374. *Fowle v. Welsh*, 1 Barn. & Cress. 29. S. C. 2 Dow. & Ryl. 133. *Wotton v. Hale*, 2 Saund. 181, n. 10. And there seems to be no difference in this respect between an *assumpsit* and a *covenant*; see *Hayes v. Bickerstaff*, Vaugh. 120. *Bloxam v. Walker*, ubi supra.

Semb. *S. C. Jepson v. Jackson*, 2 Lev. 194. 3 Keb. 755, 761.

( C. 613. )

**TRESPASS.** The defendant pleads a licence to him for himself, his wife, and children, by the plaintiff. The plaintiff replies, that he did not give a licence to him and his wife *modo et formâ*. After verdict for the plaintiff, it was moved in arrest of judgment, that here was no issue joined; for the defendant pleads a licence to himself, and the plaintiff says he gave none to him and his wife. And the Court held this to be naught, and not to be aided by the *modo et formâ*; for here is a substantial difference; for if the licence were given to him for to bring on his wife and children, if he died, this would not serve the wife; but if it were a licence to him and his wife, if the husband died, it would survive to the wife; as where a man makes a lease at will to two, if one dies, the lease is not determined (a); and thereupon the Court ordered a repleader (b).

In trespass, defendant pleaded a licence "to him for himself, wife, and children;" the plaintiff replied no licence "to him and his wife, *modo et formâ*:" a repleader was awarded after verdict. A licence to A. and his wife to enter, survives to the wife; *secus* of a licence to A. to enter with his wife.

(a) Co. Lit. 55 b. 5 Co. 10. Dyer, 269 b.

this decision was upon error on a judgment in C. B., which was reversed.

(b) According to Levinz and Keble,

( C. 614. )

**MEMORANDUM.** It was said by *Wylde*, that if there be two jointenants or tenants in commom of goods, and the one gets all into his possession, the other hath no remedy but to take them again; but if one destroys them, or \* actually converts them, the other may have trover, &c. 1 Inst. 200. [*Et semble q' le reason est*, because when the thing is destroyed, the other is deprived of the remedy of taking it again.] (a).

Trover lies by one tenant in common or

[ \* 451 ] joint-tenant against another, for destroying or actually converting the goods.

(a) This dictum probably occurred in *Bastard v. Stukely*, 3 Keb. 756. See *Acc. Pennings v. Ld. Grenville*, 1 Taunt. 241. *Heath v. Hubbard*, 4 East, 110. And a sale by one tenant in common of the whole property is a conversion of the

share of the other. Semb. *Barton v. Williams*, 5 Barn. & Ald. 395. *Sed vid. Heath v. Hubbard*, supra. An action of account lies between joint-tenants and tenants in common, by stat. 4 & 5 Anne, c. 16.

GARDINER v. SEDGWICK.

S. C. 3 Keb. 763, 780.

( C. 615. )

**AUDITA querela.** The plaintiff declares, that he being before in execution and escaping, the defendant had brought his action of escape against Sir John Lenthall, who was the

Upon the escape of a prisoner in execution on civil process,

*quære*, whether the party can retake him after a recovery (without satisfaction) in an action of escape against the gaoler?

gaoler, and judgment against him; but did not say, that he was satisfied by Sir John Lenthall.

And it was argued by *Leviston*, that although the defendant at the first had his election, either to sue the gaoler, or to take the party again, yet here he having made his election, and sued and recovered against the gaoler, shall never after resort to take the party; as in a debt upon a bond, where a man binds himself and his heirs, and dies, the obligee hath election either to sue the heir or executor; but if he once sues the heir, and recovers against him, he shall never after resort to the executor; and so in a case of a grant of a rent, if the party elects to have it by way of annuity, it shall be a rent no more; and if he elects to have it a rent, it shall be an annuity no more; and he cited *Cro. Car.* 240, where this point seems to be admitted. And *Wylde* seemed to incline to this opinion (a). But afterwards it was agreed.

(a) The inclination of the rest of the court seems to have been contrary to this. See *S. C.* 3 *Keb.* 763: but the report of

*Keble* differs in several respects from the above, and is very confused.

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## DE TERM. S. TRIN. 1677.

IN BANCO REGIS.

( C. 616. )

*Semb. S. C. Butts v. Penny, 2 Lev. 201. 3 Keb. 785.*

Trover lies for a negro slave.

**TROVER** and conversion. Held *per Curiam*, that although by the law with us a man cannot have an absolute property in the body of another, yet the custom of India concerning buying and selling of slaves being found, it was held, that a trover and conversion would lie well enough (a).

(a) The report of *Keble* is curious. "Special verdict in trover for 10 negroes and a half, finds them usually bought and sold in India, &c. *Per Curiam*, they are by usage *tanquam bona*, and go to administrator until they become Christians; and thereby they are enfranchised." N. B. The plaintiff was not possessed of these negroes in England, but in India; and no judgment was ever given; see the argument of *Hargrave* (who had the roll examined) in *Sommersett's case*, 20 *How. State Tri.* p. 52. And see *Cham-*

*bers v. Warkhouse*, 3 *Lev.* 337. *Gelly v. Cleve*, 1 *Ld. Raym.* 147. *Chamberlain v. Harvey*, *Ibid.* 146. *S. C. Carth.* 396. *Smith v. Browne*, 2 *Salk.* 666. *Smith v. Gould*, *Ibid.* *S. C.* 2 *Ld. Raym.* 1274. *Wedgewood v. Bayly*, 2 *Show.* 177-8. *Sir T. Grantham's case*, 3 *Mod.* 120. *Pearne v. Lisle*, *Ambler*, 76. *Sommersett's case*, *Lloft's Rep.* 1, and 20 *How. State Tri.* p. 1, and the notes, *ibid.* *Forbes v. Sir A. Cochrane*, 2 *Barn. & Cress.* p. 448. *S. C.* 3 *Dow. & Ryl.* 679. *Barrington's Obs. on Stat.* p. 312, 313, 5th ed.

( C. 617. )

## FORTESCUE v. ABBOT.

*S. C.* 2 *Lev.* 202. *T. Jo.* 79. 3 *Keb.* 788, 824. *Pollexf.* 479.

See margin, post, p. 481.

**EJECTMENT.** Special verdict. The plaintiff claimed by a devise. And *Saunders* took exceptions to the verdict, because it did not find that the land was socage tenure, for



otherwise it should be intended knight's-service; and he cited Cro. Eliz. 667. 4 Leon. 196. Moor, 279. *Sed Dy. 329, cont.* And the Court said that of late they do usually intend so- *Post, p. 482.* cage tenure, if the contrary do not appear.

For the matter in law, it was the very same with *Wood* and *Ingersole*, 2 Cro. 260, for here was a devise to four children for life, and if either died, his part should go to the survivor; and the eldest son died first, and the plaintiff was the heir. *Et adjournatur.* And by the descent of the reversion to him his estate was drowned. [*S. C. post, p. 481.*]

[ 453 ]

( C. 618. )

## TAYLOR v. BAKER.

S. C. 2 Lev. 203. T. Jo. 97. 2 Mod. 214. 3 Keb. 748, 788, 802.

*Sci' fa'* upon a judgment in this Court. The defendant pleaded, that he was taken in execution by a *ca' sa'* and that he, being there, sent about after the plaintiff, and being he could not find him out, paid the execution money to Sir Jo. Lenthall, the then marshal of the King's Bench, and he voluntarily set him at large. And the question was, whether this was a good plea? And *per Curiam* it is not.

Payment to the gaoler by a party in execution, under a *ca. sa.* is no discharge. Payment to the sheriff upon a *fi. fa.* is good: *semb. aliter*, upon a *ca. sa.* *post, p. 482.*

For when the party is committed to prison, the gaoler hath no authority to receive the money; but the party, if he cannot find the plaintiff, may pay it into Court, and so have his *audita querela*. 1 Leon. 141.

Payment is no plea to matter of record. *Sed vid. 4 Ann. c. 16, § 12. 2 Salk. 508.*

And they did incline, that a sheriff upon a *ca' sa'* could not receive the money, so as to discharge the party; but if the sheriff should prove insolvent, he might resort to the party again; but it is otherwise upon a *fi' fa'*, though that were long doubted; but that is to levy the money, but the *ca' sa'* doth authorise him only to bring the body into Court (a).

2 Rol. Rep. 58. Cro. Car. 328.

And although formerly the law was held, that if the gaoler discharged a person that was in execution, that he could never be taken again; yet since the case of *Roberts* and *Trevilian* the law is held otherwise. 1 Roll. 902.

*Ante, p. 213. Basset v. Salter.*

But another incurable fault in this plea was, that it is matter *in fact, scil.* payment, pleaded against a record, which cannot be discharged but by matter of record or specialty. And so judgment *pro quer'*.

(a) See *Stamford v. Davies*, *post, p. 482.* *Morton's case*, 2 Show. 139. *Langdon v. Wallis*, 1 Lutw. 587. 12 Mod. 230, 385. *Cranmer's case*, 2 Salk. 508. *Slackford v. Austen*, 14 East, 468. *Brett*

*v. Tomlinson*, 16 East, 293. 19 Viner, 436, Sheriff, F. If before sale under a *fi. fa.* the defendant, or any other person for him, tender the money to the sheriff, he cannot sell. *R. v. Bird*, 2 Show. 87.

(C. 618b.)

NOTE, that if a declaration be given of a precedent term, the party hath only the four first days of the following term to plead in abatement.

Time for pleading in abatement.

( C.619. )

## EARL OF SHAFTSBURY'S CASE.

S. C. 6 State Tri. 1270, 8vo. edit. 1 Mod. 144. 3 Keb. 792.

The court of K. B. will not bail a peer committed by the House of Lords, though the commitment be "for contempt" generally, and "during the

[ \*454 ] pleasure of the king and of that house," and though the house be adjourned. *Semb. aliter*, in case of a prorogation or dissolution.

*Ante*, p. 431.

He being brought from the Tower by *habeas corpus* to this Court, the return was, that he was committed by an order of the House of Lords for several high contempts committed against that house, and to be detained during the pleasure of the king and of that house.

For the Earl of Shaftsbury it was argued by *Williams*, *Wallop*, *Smith* and *Ayres*, that he ought to be either bailed or discharged.

\* 1. By reason of the generality of the offence alleged, it not being shewed wherein this contempt was, nor when it was committed, and it might be before the act of pardon, nor where, whether it was in the house or out of the house, and *non constat*, whether it be an accusation of a contempt only, or a conviction. *Vide Moor*, 839. 2 Inst. 52, 53, 55. 1 Roll. 218, 219. *Bushell's case*, *Vaughan's Rep.* [*Ante*, p. 1.] Hob. 210. Roll. 69. *Moor*. 245. 39 Ed. 3, 14.

And although it be a matter relating to the parliament, yet this Court ought in all cases to declare the law whensoever a matter comes before them; and so they did in the case of Sir *George Elliot*, where the question was, whether an original might be filed against a member of parliament. Hil. 24 Ed. 4. Rot. 5, in *Scaccario*. Dy. 60. Hob. 109, 111, 29. Roll. Rep. 29. where it appears that the Court doth determine concerning matters relating to the parliament, as that there is no privilege for treason, felony, &c.

And if this Court should not relieve in this case, there would be a failure of justice; for now the parliament is adjourned, there is no applying to them; and if the parliament were prorogued or dissolved, this Court ought, without question, to relieve the party; and by the same reason here.

The limitation of the time makes this commitment void, for it is during the king's pleasure and the House of Lords'; and when shall they meet together to determine it? For the king's pleasure is determinable in this Court, and the other in the House of Lords; for the king's pleasure shall not be intended his personal pleasure, nor his commandment, but that which is legal and in Court. 2 Inst. 187.

The jurisdiction of the House of Lords is a limited jurisdiction, as appears by 1 H. 4, 14, and for all appears, this may be a commitment for a contempt in a matter that was not relievable there; as if they should grant a tax and should commit a person for not paying, under the notion of a contempt, it would be hard if this Court would not relieve him.

Another thing alleged was, that this session was at an end, and then all their orders are determined; and it is ended by his majesty's assent to the several bills that passed, and no provision made, that it should not determine the session, as

hath been done in other cases; and though my Lord Coke, 4 Inst. 27, be *è contra*, yet the authorities he there cited \* do not warrant his opinion: but the Court to that point [ \* 455 ] was *è contra*.

The session of Parliament is not ended by the royal assent to bills. 1 Mod. 151, 157-8. 2 Hats. Prec. tit, King, p. 246-7, in 2d ed.

For the king it was argued by Serjeant *Maynard*, the Attorney, Solicitor and *Pemberton*, that although it be commonly said, that this is the supreme Court, yet that is intended in respect of other ordinary courts of justice; and the Judges have formerly repaired to the House of Lords, and taken their advice in the exposition of the law, as 40 Ed. 3, the case of Amendments. And the Lords are a superior court in point of jurisdiction, as appears by writs of error brought there upon judgments in this Court.

It would have been in vain to have expressed the particular cause of commitment, for as much as this Court will not adjudge of it; but they are the best judges themselves. 4 Inst. 50.

And in *Thorp's* case they would not deliver any opinion concerning the extent of the privilege of parliament; and we know that in the case of *Hollis* it was resolved in parliament, that offences committed in parliament are not punishable out of it; and the judgment in this Court was reversed.

Cro. Car. 181. Ante, Case 503.

This Court cannot bail him, because the matter is not conusable here, and the bail is, that he should appear in order to his trial, which cannot be here of a matter in parliament.

Though he be committed during the pleasure of the king and that house, it is not necessary that both do determine their pleasure; but if either determine their pleasure, he ought to be enlarged; as where an estate is made during the abode of B. and C. at London. 5 Co. *Brudnell's* case.

And besides, by the *Attorney-General*, if the sessions be determined, the order is determined, for the orders of either house continue no longer than during the session.

But here the session is not ended by the king's assent to some bills: and they relied on 4 Inst. 27. Hutton's Rep. 1 Car. For the passing of bills makes it a session, but doth not determine it. 4 Inst. 27, 28. Vide 1 H. 7, 10. 2 Cro. 111, 342.

And in the case of *Soames* and *Barnardiston*, the Court did agree, that if the election had not been determined in parliament before the action brought, that the action would not have lain. Ante, p. 390.

\* *Judicium per Curiam*:—He ought to be remanded: for [ \* 456 ] he being committed by the House of Lords, which is a court superior to this, and the parliament being in judgment of law yet sitting, this being but an adjournment, this Court hath no power to examine their orders; and although this return, if the commitment had been by an inferior court, had been naught, by reason of the generality of it, yet this Court now hath no authority to examine yet; but if the par-

Ante, p. 350.

liament were prorogued or dissolved, it may be it might be otherwise (a). *Per Rainsford*:—This commitment is in the nature of an execution. And they were all of that opinion, that the passing of acts did not determine the session (b).

(a) Acc. *R. v. Knollys*, 1 Ld. Raym. 18. *Earl of Danby's case*, 2 Show. 335, and in the State Trials, 2 Hawk. P. C. c. 15, § 74. But see *Lord Salisbury's case*, Carth. 131-2.

(b) See *Bushell's case*, *ante*, p. 2, n. (a). The *Earl of Danby's* and *Lord Salisbury's cases*, cited in the last note. *R. v. Paty*, 2 Ld. Ray. 1105. *S. C.* 2 Salk. 503. *Murray's case*, 1 Wils. 299. *Brass Crosby's case*, 3 Wils. 188. *S. C.* 2 W. Black-

754. *Flower's case*, 8 Term Rep. 314. *Burdett v. Abbot*, 14 East, 1. *S. C.* on error, 4 Taunt. 401, and 5 Dow. 199. *R. v. Hobhouse*, 2 Chit. Rep. 207; and see 2 Hawk. P. C. c. 15, § 73-4. Bac. Ab. tit. Bail in Criminal Cases, (D). See the proceedings in the House of Lords in *Shaftsbury's case*, in 2 Hats. Preced. Appendix. 6 Howell's State Tri. p. 1297. 1 Timberland's Lords' Debates, p. 196, 203. Burnet's own Times, Anno. 1677.

(C. 620.)

## BROWNE'S CASE.

*S. C. post*, p. 524.

An indictment may recite parts of a libel without setting forth the whole *in hæc verba*.

AN information was preferred against him for publishing several scandalous libels, and he was found guilty of one only, called "The long parliament dissolved."

Exception was taken to the information, because it doth not set forth the libel *in hæc verba*, but only recites parts of it.

But that was ruled to be well enough, either in an indictment or an information, to avoid prolixity, and they cited Co. Entries, tit. *Indictment*.

*Note*, that he was fined 1000 marks, and was to be bound to the good behaviour for seven years, and to stand committed till he paid his fine (a).

(a) Acc. *R. v. Bear*, 2 Salk. 417. *Cartwright v. Wright*, 5 Barn. & Ald. 617. But if separate passages are set out in one count, they must be described

as such, and not stated as if they formed one entire, continuous passage. *Tabart v. Tipper*, 1 Campb. 352.

[ 457 ]

## DE TERM. S. MICH. 1677.

IN BANCO REGIS.

(C. 621.)

## WOOLLEY v. ROBINSON.

*S. C.* 1 Vent. 309, 319. T. Jo. 78. 2 Lev. 199. 3 Keb. 747, 773, 821.

A mandate to induct, granted by the guardian of the spiritualties, cannot be executed by the archdeacon after the consecration of a new bishop.

THE case was, the bishoprick of Gloucester being vacant, the guardian of the spiritualties granted a warrant to the archdeacon for induction, and before the warrant was executed another was made bishop, and then induction was made by virtue of the said warrant.

Resolved *per Curiam*, that the induction was void; for when a new bishop was made, the authority of the guardian of the spirituality was determined, and the authority given

by his warrant (not being executed) did cease; and compared it to the case of a writ granted, and then the king dies; the party cannot be arrested by virtue of that writ; but that is reserved by statute, so that such process may be executed in the reign of the succeeding king. Dy. 165 (a).

(a) Reversed in the Exchequer Chamber. *Post*, p. 463. T. Jo. 79. The clerk had been admitted and instituted during the vacancy of the See by the archbishop of Canterbury, who was the guardian of the spiritualties; and the special verdict found that the archdeacon had no notice of the consecration of the new bishop. 1 Vent. 320. The case is cited by Gibson in his Codex, tit. 34, c. 9, *in notis*, who assigns as a reason why the mandate of the archbishop was voidable only,

and not void, that "it is the act of one who has authority throughout his province." But the ground of the reversal, as given by the Lord C. North, *post*, p. 463, seems to have been, that the induction was merely informal, and the informality not examinable in the temporal courts. That induction, however, is a temporal act, and cognizable in the temporal courts, see *Hutton's case*, Hob. 15. *Monday v. Porton*, 2 Lev. 125. Gibs. Codex, *ubi supra*.

### DR. WEBB'S CASE.

( C. 622. )

*S. C. ante*, p. 396, 407.

He being parson of \_\_\_\_\_ was distrained for not doing his duty in repairing the highways; whereupon he brought trespass for taking his goods; and the question upon the special verdict was, whether or no he, \* being a clergyman, was liable to the repair of the highways? And resolved *per Curiam*, that he was; and so judgment was given for the defendants. [*S. C. post*, 488.]

[ \* 458 ]

### ENT v. WITHERS.

( C. 623. )

*S. C.* 1 Vent. 315, 321. 2 Lev. 209. 3 Keb. 797. *S. C.* but not *S. P. post*, p. 467.

It was held *per Curiam*, that an action of debt upon a bond would not lie against an executor in the *Debet* and *detinet*, upon a bare suggestion of a *devastavit*; but otherwise it is of a judgment (a).

Debt on bond does not lie in the *debet* and *detinet* against an executor suggesting a *devastavit*. *Aliter*, of a judgment. Cart. 2. 2 Ander. 55.

(a) Acc. *Corey v. Thinne*, 1 Lev. 147. *Horsey v. Daniel*, 2 Lev. 145. *Berwick v. Andrews*, 2 Ld. Raym. 971. *S. C.* 1 Salk. 314. 6 Mod. 125. Com. Dig. Administration, I. 3. Notes to *Wheatly v. Lane*, 1 Saund. 216, 219 b. And see *Browne v. Collins*, *ante*, p. 392.

*Semb. S. C. Saunders v. Williams*, 1 Vent. 319. 3 Keb. 820.

( C. 624. )

A COMMONER brought an action upon the case for eating up his common, and declared that he was seised of Black Acre, to which he had common appendant, &c. Exception was taken, because he did not shew what title, or what estate he had to or in Black Acre: but it was overruled, for that this was but a possessory action, and his seisin of Black Acre but inducement (a).

In case for disturbance of common, it is unnecessary to state a particular title to the land to which the common is appendant.

(a) Acc. *St. John v. Moody*, 1 Vent. 2 Vent. 138. *Warren v. Sainthill*, *Ib.* 274. *Anon. Ib.* 356. *Dickman v. Allen*, 185. *Chapman v. Flesman*, *Ib.* 286.

*Strade v. Birt*, 4 Mod. 418. *S. C. Comyn*, 3 Wils. 278. *Grimstead v. Marlow*, 7. *Dorney v. Cashford*, 1 Ld. Raym. 4 Term Rep. 718. Notes to *Mellor v. 266. Kenrick v. Taylor*, 1 Wils. 326-7. *Spateman*, 1 Saund. 346, and *Serle v. Atkinson v. Teasdale*, 2 W. Black. 817. *Bunnion*, ante, p. 206.

( C. 625. )

SMARTHILL v. SCHOLLAR.

S. C. T. Jo. 98. 2 Lev. 207. 1 Vent. 323. 3 Keb. 816, 832.

A. devises to his younger son, after the death of his (A.'s) wife: the wife shall not take an estate by implication in the *interim*. Moo. 7, 123. Cro. Jac. 75. 8 Viner, 354.

A. DEVISETH Black Acre to B. his younger son, after the death of his wife. The question was, whether the wife should take an estate by implication? And resolved *per Curiam*, that she shall not; and the difference was agreed where the devise is to the heir after the death of another, there that other person shall take an estate by implication, because the intent of the devisor is manifest, that the heir shall not have it till that other person is dead; but otherwise it is if the devise be to any person besides the heir, for there the heir shall take in the *interim* (a).

(a) *Gardiner v. Sheldon*, ante, p. 11. *London v. Garway*, 2 Vern. 571. *Goodright v. Hoskins*, 9 East, 306. *Dashwood v. Peyton*, 18 Ves. 40-8. *Pybus v. Mitford*, p. 370. *Holmes v. Meynel*, T. Raym. 452. 2 Show. 136. *Faulkner v. Faulkner*, 1 Vern. 22.

( C. 626. )

JAMES v. RICHARDSON.

S. C. T. Jo. 99. 2 Lev. 232. 1 Vent. 334. 3 Keb. 832. T. Ray. 330. Pollexf. 457.

See margin, p. 472.

[ \* 459 ]

Ante, p. 244.

HENRY WEAKES deviseth the manor of D. unto ——— Higden, during the life of Robert Jordan, upon trust that Robert should take the profits, and after the death of Robert Jordan, to the heirs male of the body of Robert Jordan now living, and to such other heirs male and female of the said Robert Jordan. Higden makes a feoffment, and levies a fine in the life of Robert Jordan; \* he had issue John at the time of the devise. The question was, whether John had an immediate estate in remainder vested in him by this devise, as though he had been named, or whether it rested in contingency during the life of Robert the father, *quia non est hæres viventis*? For if so, then it was agreed by all, that it was destroyed by the fine of the devisee for the life of Robert.

And the Court did incline, that by reason of the words "now living" John should take an estate in remainder immediately, and not in contingency; and that the words "heirs male of Robert now living" are a sufficient description of the person of John, although in strictness of law a man cannot be said to have an heir during his life. *Advis. vult Cur.* (S. C. post, p. 472.)



## DE TERM. PASCHÆ, 1678.

IN BANCO REGIS.

## UP JOHN v. CONDUIT.

( C. 627. )

ACTION upon the case for not grinding at his mill. Upon not guilty pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment by Mr. *Pollexfen*, who took these exceptions:

Custom to grind at the plaintiff's mill, how to be stated.

1. He laid it, that all the tenants of the manor *usi fuerant et consueverunt molere*, &c. and did not say *quod infra manerium talis habetur consuetudo*, nor *quod debuerunt* to grind there; and it may be, although they had used time out of mind to grind there, yet that they did it voluntarily, and were not obliged (a).

Whether a custom to grind at the plaintiff's mill all corn *expensa et expendibilia* within the manor, be good?

\* 2. He did allege, that he had always kept his mill in repair at his own charge: therefore,

[ \* 460 ]

3. He laid, that they ought to grind all their corn *expensa et expendibilia* within the said manor, which he said was a void custom, for people may spend their corn several ways without grinding; and it is unreasonable that they should be obliged to grind all the corn there that they spend; but it should have been, for all that they grind and spend. *Vide* Hob. 189 (b).

(a) A particular statement of the custom was unnecessary; but it should seem that the immemorial use of the mill must appear upon the declaration to have been obligatory. *Quod debuerunt*, &c. would be sufficient. And *quare*, whether the words *usi fuerant et consueverunt* would not imply a prescription or custom? See *Heblethwait v. Palms*, Carth. 84. 3 Mod. 48, 52. Com. Dig. Pleader, C. 39. *Anon.*

1 Lev. 12. Com. Dig. Præscription, H. See further on the form of pleading, *Coryton v. Lithebye*, 2 Saund. 113, and n. (1), *ibid.* *Bailiffs of Tewkesbury v. Diston*, 6 East, 438, n. (a).

(b) That the custom was void, see *Coryton v. Lithebye*, 2 Saund. 117. *S. C. ante*, p. 20, and the cases referred to in note (b), *ibid.*

## SMART'S CASE.

( C. 628. )

FUIT dit al moy. per Serjeant *Rawlings*, q' Smart buy peres emblee en market, & le darrein assizes al Warwick le felon fuit convict al prosecution del owner, & fuit order per Justice *Wyndham*, q' fuit le judge del assize, q' le owner ad a restitution nient obstant le sale, per vim statut. 21 H. 8, accordant al' 2 Inst. 714. Et issint est le constant practice.

I was told by Serjeant *Rawlings*, that Smart bought stolen *jewels* (?) in a market, and at the last assizes at Warwick the felon was convicted at the prosecution of the owner; and it was ordered by Justice *Wyndham*, who was the judge of assize, that the owner should have restitution notwithstanding the sale, by force of the statute 21 Hen. 8, agreeably to 2 Inst. 714. And so is the constant practice (a).

If the owner of stolen goods prosecutes the felon to conviction, he shall have restitution, notwithstanding a sale in market-overt.

(a) See 1 Hale's H. P. C. p. 542-7. *Kelynge*, 35, 48. *Horwood v. Smith*,

2 Term Rep. 750. *Featherstonhaugh v. Johnston*, 8 Taunt. 238-9.

## DE TERM. S. TRIN. 1678.

IN BANCO REGIS.

( C. 629. )

HOLLMAN v. SENHOUSE.

S. C. 2 Lev. 225. T. Jo. 105. Pollexf. 523. 2 Show. 11.

See margin,  
post, p. 469.

[ \* 461 ]

**EJECTMENT.** Special verdict. The jury found a deed, in which deed there were these words, viz. "and it is covenanted and agreed betwixt the said parties, and the said J. S. doth covenant for himself, his heirs, executors and assigns, that if he shall die \* without issue of his body, that then he doth give, grant, alien, release and confirm the land in question unto E. B. his natural mother, to have and to hold to her and her heirs for ever;" and it was found that there was never any other execution of this deed by livery, &c. but only the sealing and delivery of it.

And the question was, whether or no this should amount to a covenant to stand seised, and should vest the estate in the mother, the son being now dead without issue?

S. C. ante, p.  
368.

And the case chiefly relied upon by *Saunders* of the mother's counsel was the case of *Crossing* against *Scudamore*, which was adjudged first in this Court, and afterwards was affirmed in a writ of error, where the case was, that the father did give, grant, bargain and sell, enfeoff, alien, release and confirm unto his son Black Acre; and the deed was inrolled, and a warranty was in the deed, but no money paid, so that it could not pass by way of bargain and sale; and it was held, that an estate did rise by way of covenant to stand seised..

And *Saunders* said this case is the very same with that, only here is a precedent estate to take effect, viz. to J. and the heirs of his body; and he held, that although the words were, "if he did die without issue," yet this did not make the use contingent, but that it should rise presently, and the covenantor's estate should be altered, so that he should be tenant in tail, and it should be all one as though he had covenanted to stand seised to the use of himself and the heirs of his body, with the remainder to his mother in fee; and compared it to the Lord *Pagett's* case, where that estate that is not limited away continues in the covenantor by implication, as it did in the Lord *Pagett's* case, where the limitation was made to a stranger, so that the use could not rise.

1 Co. 154.

If A. covenant to stand seised to the use of his son after his (A.'s) death, this makes A. tenant for life. But if it be after the death of a

*Note,* That if a father covenants to stand seised to the use of his son after his own death, this makes the father immediately but a tenant for life; but if he covenants to stand seised to the use of his son after the death of a stranger, there the father continues seised in fee; because the use to the son is contingent; for there the stranger may die before the father, so that he cannot there gain an estate for life by impli-

cation, for that the use may rise to the son in the life of the father. (See *S. C. post*, p. 469.)

*stranger*, then A. continues seised in fee.

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( C. 630. )

## LISLE v. GRAY.

*S. C.* 2 Lev. 223. *T. Jo.* 114. *T. Raym.* 278, 302, 315. 2 Show. 6. *Pollexf.* 582.

A. MAKES a conveyance to the use of himself for life, the remainder to the first son and the heirs male of his body, remainder to the second son and the heirs male of his body, remainder to every other heir male of the body of the said A. and the heirs male of the body of such heir male, as they shall be in priority of birth and seniority of age (a).

The word *heir-male* may be a word of purchase in a deed, *semb.*

The first and second son die without issue; the question was, whether A. be become tenant in tail; and resolved that he is but tenant for life (b).

(a) See the conveyance at length in *T. Ray.* 278.

(b) The general import of the words *heir* or *heirs* may be qualified by reference to preceding distinct and particular limitations to the first and certain other sons in tail, as well as by words of limitation grafted on them. See *Butl. Fearn's Cont. Rem.* 152. *Ibid.* 148, &c., 196, 203, n. The above case of *Lisle v. Gray*, was affirmed on error in the Exchequer Chamber; *Legate v. Sewell*, 1 P. Will. 87-9. And see further, *Walker v. Snow*, *Palmer*, 359. *Goodright v. Pullyn*, 2 Ld. Ray. 1437. *James v. Richardson*, *post*, p. 472. *Hodgeson v. Bussey*,

2 *Atkins.* 89. *Bagshaw v. Spencer*, *Id.* 570. *Doe v. Laming*, 2 Burr. 1100, 1112. *S. C.* 1 W. Black. 265. *Doe v. Smith*, 7 Term Rep. 531. *Perrin v. Blake*, *Harg. Law Tracts*, p. 506. *Poole v. Poole*, 3 Bos. & Pull. 620. *Goodtitle v. Herring*, 1 East, 264. *Doe v. Ironmonger*, 3 East, 533. *Meredith v. Meredith*, 10 East, 503. *Doe v. Goff*, 11 East, 668. *Bayley v. Morris*, 4 Ves. 788. *Gretton v. Haward*, 6 Taunt. 94. *Roe v. Bedford*, 4 Maul. & Selw. 362. *Doe v. Jesson*, 5 Maul. & Selw. 95. *Measure v. Gee*, 5 Barn. & Ald. 910. And see 8 Viner, 254. 2 Cruise Dig. 380, 2d edit. 2 Fonblanq. Treat. of Eq. p. 72-3, 5th edit.

## NORRIS v. ELSWORTH.

( C. 631. )

LESSEE covenants to deliver up the possession to the lessor at the end of the term. The lessor brings covenant, and assigns breach for not delivering up the possession.

It was objected for the defendant, that the plaintiff ought to have alleged a request; for he was to do the first act, viz. to demand it; for if he would not come and take it, it was impossible the defendant could deliver it to him.

But to that it was answered, that if the plaintiff were not ready to receive, the defendant might have pleaded, that he was ready to have delivered it, and that no body was there to receive it. And so judgment was given *pro quer'* (a).

In declaring on a covenant by lessee to deliver up possession to lessor, at the end of the term, it is needless to allege a request. The defendant may plead that he was ready to deliver, and that no body was there to receive.

(a) See *Ashenden v. Clapham*, *ante*, p. 113, and note (a), *ibid.* *Bristow v. Waddington*, 2 New Rep. 355, and the

arguments of *Richardson*, *Holroyd* and *Bayley*, Justices, in the case of *Rowe v. Young*, 2 Brod. & Ring. to the same effect.

## ( C. 632. )

Arbitrators award releases of all actions to the time of the award: It shall be intended that no new matters happened between the submission and award, unless shewn.

MAKING *v.* WELSTROP.

ARBITRAMENT. The award was, that the parties should seal releases of all actions to the time of the award. It was objected, that this was larger than the submission, for there might be new matters betwixt the submission and the award. [1 Rol. 259.] But *per Curiam*, that shall not be intended, unless it be shewn (a). 2d *Obj.* This releases the very bonds. But *per Curiam*, all things being to be done at the same time that are awarded to be done, it is well enough.

(a) *Ante*, p. 51, C. 62 b. *Ayland v. Nicholls*, *ante*, 265-6. Bac. Ab. Arbitrament, (E). 1. Com. Dig. Arbitrament, E.

10. *Ingram v. Milnes*, 8 East, 445. *Hill v. Thorn*, 2 Mod. 309. *Perry v. Nicholson*, 1 Burr. 278.

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## ( C. 633. )

In covenant on a lease "yielding and paying 10l. at Michaelmas if demanded, or within ten days after," no statement of a demand is necessary. An administrator, suing for rent due since the testator's death, must shew that his testator had a chattel interest.

NORRIS *v.* ELSWORTH.

COVENANT. Upon a lease for years, "yielding and paying 10l. at Michaelmas, if it be demanded, or within ten days after." The breach assigned was for non-payment of the rent.

*Obj.* It is not said, the rent was demanded at the day, and then it is not due.

*Ans. per Curiam*: If it be not demanded, it is due at the day, though not payable; but however it is due ten days after (a).

The great objection was, the plaintiff had brought this action as administrator of the lessor for rent, part whereof did grow due after the death of the lessor, and so he had not intitled himself to it; for he ought to have set forth, that the lessor was possessed of a term for years, and so did demise part of the term; but he not alleging it, it shall be intended that the lessor was seised in fee, and then the rent belongs to the heir, and not to the executor, that did accrue due after the lessor's death.

And as to this objection the Court seemed to incline, that it could not be answered, but however gave the plaintiff day to answer it (b).

(a) As to the necessity of a demand, see *ante*, p. 24, 113, 242. Com. Dig. Rent, D. 3, 4. *Rowe v. Young*, 2 Brod. & Bing. 216, 234-5, and *ante*, C. 631.

(b) See the precedents in Vidian, 201. 3 Wentw. Plead. 456-7; and *Mackay v. Mackreth*, 2 Chitty Rep. 461.

## ( C. 634. )

WOOLLEY *v.* ROBINSON.—AT SERJEANTS-INN.

*S. C. ante*, p. 457.

Induction by virtue of a mandate, granted by the guardian of the spiritualties, and executed after the consecration of a

A WRIT of error being brought, the judges at Serjeants-Inn seemed to be of a contrary opinion to the judges of the King's Bench. And the reason given by *North* was, that the temporal courts have not properly the examination of the formalities of induction; so that if the archdeacon would, without any warrant or mandate, make induction, that it could

not be avoided here, though it may be by the civil law he might be punished by the bishop; and cited Noy, 134, where an archdeacon made a general mandate to the clergy within his archdeaconry to induct, yet if a clergyman out of his archdeaconry did it, it was held well enough.

, (a) 17 Viner, 354. *Ante*, p. 457, n. (a).

new bishop, is not void. Formalities of induction are not examinable in the temporal courts (a).

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RIGBY v. WOODWARD.—AT SERJEANTS-INN.

( C. 635. )

S. C. T. Jo. 87.

ERROR to reverse a judgment in the King's Bench.

The Lord of Oxford was indebted to Woodward in 240*l.* and writ a letter to Rigby [his receiver] to pay him; whereupon Woodward came to Rigby with the letter, and [who?] told him, if he would take 220*l.* for his debt he would pay within fourteen days. And the money not being paid, Woodward brought an *assumpsit*, and for his consideration laid his agreement to abate 20*l.* and had judgment in the King's Bench; and now Rigby brought a writ of error.

*Assumpsit* lies upon a promise to pay the debt of a third person within fourteen days, in consideration of an agreement by the plaintiff to abate part of it. And *semb. per* North, C. J. the original debtor may take advantage of such an agreement.

On the plaintiff's part it was urged, that this agreement to abate 20*l.* was no consideration, he being a stranger, and not liable to the payment of the debt; and cited Cro. Eliz. 653: and this agreement with the plaintiff to abate 20*l.* could signify nothing, for notwithstanding that, Woodward might have sued my Lord for the whole. 1 Rol. 28, N. 35.

On the other side it was alleged, that where the plaintiff did do any act at the defendant's request, that was a sufficient consideration, though the defendant had no benefit by it; and cited the case of *Clepson v. Morris*(1), B. R. Mich. 25 Car. 2, where the case was, that one Malin drew a note upon Morris to pay Clepson 50*l.* and Morris, upon sight of that note, did promise Clepson, that if he would take him for paymaster, he would pay him the money; and adjudged a good consideration (a).

(1) S. C. 1 Lev. 248. 1 Vent. 9.

Another case was cited of *Smith v. Hawkins* (2), Trin. 24 Car. 2. Rot. 1093, where the defendant being an executor, in consideration the plaintiff would account with him, did promise him to pay what should be found owing to him from the testator; and this was held a good consideration, though he had no assets; because here was an act done, viz. accounting, at the plaintiff's request. Cro. Eliz. 703.

(2) S. C. 3 Keb. 336, 417. 2 Lev. 122. 1 Vent. 268. *Sed vide* 1 H. Black. 104.

*Davies v. Hessy* (3), Mich. 23 Car. 2. One Fenwick was indebted to the plaintiff; the defendant received Fenwick's rents, who sent the plaintiff to the defendant for the money; and the defendant, in consideration the plaintiff would forbear his debt till such a day, did promise to pay him; and held a good consideration; which was said to be almost like this case; for although here was no express agreement to forbear, yet the promise was to pay fourteen days after, which was tantamount.

(3) S. C. *Davison v. Hanslop*, T. Ray. 211. 1 Vent. 152-4. 2 Lev. 20.

(a) It was adjudged no consideration. And see *Oble v. Dittlesfield*, 1 Vent. 254. *Per Hale*, C. J.

And the judges *und voce* affirmed the judgment given in the King's Bench, and held the consideration good: for *North* said, when an agreement to abate 20*l.* is pleaded, it shall be intended a complete agreement, and such an one as my Lord might have taken advantage of (*b*).

(*b*) Sir T. Jones says that the K. B. held the consideration insufficient. See further, *Goring v. Goring*, Yelv. 11. *Oble v. Dittlesfield*, 1 Vent. 153-4. Com. Dig. Action upon *Assumpsit*, B. 1, 3, 11, F. 8. *Forth v. Stanton*, 1 Saund. 210,

and the notes by Serjt. Williams, *ibid.* And see also *Porter v. Bille*, *ante*, p. 125. *Gadbury v. Day*, p. 161. *Browne's case*, p. 409. *Day v. Caudrey*, p. 434. *Anon.* p. 439. 1 Viner, 290.

( C. 636. )

KNIGHT v. PEACHEE.

S. C. 1 Vent. 329, 331. T. Jo. 109. Upon error, in T. Raym. 303.

In debt for rent against assignee of lessee, the defendant pleads an assignment over: plaintiff may reply fraud and covin.

DEBT for rent by the assignee of the reversion against the assignee of the lessee for years.

The defendant pleaded, that before any rent grew due he assigned the term over to J. S.

The plaintiff replies, that that assignment was *per fraudem et covinam*.

The defendant demurs.

*Pemberton pro def* argued, that an assignment of a term could not be by fraud and covin, and therefore the replication was naught; for if this pleading should be allowed, then every assignment that is made to a poor man would be pleaded to be by fraud and covin; and so would in effect take away that liberty that the law allows every lessee to assign to whom he pleaseth: and there are several things wherein fraud and covin are not averrable;

As if a man deviseth a term for years, being greatly indebted and not leaving assets, and the executor assents to the legacy, and the devisee enters, a creditor that hath a judgment *de bonis testatoris* cannot take this term in execution, by averring, that this assent of the executor was *per fraudem*; but he must take advantage of it by way of *devastavit* in the executor.

And so if the testator himself give a judgment for a great sum upon little or no consideration; yet a creditor cannot after his death avoid this, by pleading that it was *per fraudem*; for fraud is not averrable in this case where the judgment is given by the testator, but he must take his remedy in Chancery; and so it is of a bill of sale made by the testator, this shall not be averred fraudulent in an action against the executor; but he to whom it is made may be sued as executor of his own wrong. *Curia advisare vult*.

Afterwards judgment was given *pro querente*, and the replication held good by three judges against C. J. Scroggs (*a*).

(*a*) Upon a writ of error, the parties agreed. T. Ray. 304. It seems doubtful whether fraud be a good replication, except where the assignor continues in

possession, see *Lehoux v. Nash*, 2 Stra. 1221. *Taylor v. Shum*, 1 Bos. & Pull. 21. *Walker v. Reeves*, Dougl. 461. Buller's N. P. 159. *Onslow v. Corrie*,



2 Madd. Rep. 330. *Cook v. Harris*, 1 219. *Valliant v. Dodenode*, Id. 546.  
 Ld. Ray. 367. For the practice in courts 1 Fonbl. Treat. of Eq. B. 1, c. 5, § 6,  
 of equity, see *Philpot v. Hoare*, 2 Atk. and the notes, *ibid*.

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## GILMORE v. SHUTER.

( C. 637. )

S. C. T. Jo. 108. 2 Lev. 227. 1 Vent. 330. 2 Mod. 310. 2 Show. 16.

A PROMISE was made, in consideration of marriage, to give his daughter as much as her husband's father should give him.

A promise in consideration of marriage, made before the stat. frauds, held good without writing, though the action was brought for a breach after it. 19 Viner, 524.

The daughter's husband was the plaintiff, who brought this action, and averred, that his father gave him 2000*l*.

The promise was made before the act of 29 Car. 2, against frauds and perjuries, but the marriage was not till after, and so the action did not accrue till after the act. The verdict here having found that there was no note in writing of this promise, the question was, whether or no this promise was within the act, so as no action should be brought upon it.

And it was held *per Curiam*, that it was not; for it would be very unreasonable to put such a construction upon the act, as should make it have a retrospect to invalidate and nullify contracts and agreements that were lawful at the time when they were made, and it may be upon very great consideration; but however, as the case is here, no action could be had before the statute, because the thing was to be done after, and so there was no breach before; and by transposing the words it may agree with the letter well enough.

T. Jo. 109.

And they said, that in case of a will, it had been resolved, that if the will were made before the act, and the party died after, yet it is not within the act to require three or four witnesses; which was said to be a stronger case than this, because the party might have altered his will, if he had pleased; but an agreement cannot, without the consent of the other party (a).

A will made before the stat. frauds is not within it, though the party died after. Acc. post, p. 542. 2 Show. 17. 2 Mod. 310. Prec. Chan. 77.

(a) The same construction has been put upon the statute of mortmain, 9 Geo. 2, c. 36. *Ashburnham v. Bradshaw*, 2 Atk. 36. *Attorney-General v. Bradley*, 1 Eden Rep. 482, and other cases cited, 2 Fonbl. Treat. of Eq. p. 214, 5th ed.

## ALFREY v. MEEKES.

( C. 638. )

DEBT for five quarters' rent. The defendant pleads as to two quarters, and saith nothing to the other three. Judgment shall be against him for the whole.

A plea bad for part is bad for the whole.

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## ENT v. WITHERS.

( C. 639. )

S. C. *Ante*, p. 458, but not S. P.

DEBT against an executor, who pleads five several judgments, viz. one for 40*l*., one for 20*l*., &c. and saith he hath

To a plea of unsatisfied judgments by an

executor, the plaintiff may reply *fraud* as to one, without answering the rest. Judgment for the plaintiff is *de bonis testatoris*.

1 Saund. 336.  
2 Saund. 49.

(1) *S. C. Edgcomb v. Dee*,  
Vaugh. 89, 103.

but 20*l.* assets, which is not sufficient to satisfy those judgments.

The plaintiff repheth, that one of those judgments was kept afoot *per fraudem et covinam*.

The defendant demurreth, because he pleadeth nothing to the rest; and it appeareth that his assets are not sufficient to satisfy those.

But *per Curiam* judgment was given *pro quer'*; for it is sufficient for him if he hath found one that is by fraud; for he is a stranger, and cannot be presumed to know all particulars concerning them; and besides, judgment is but *de bonis testatoris*. And Judge *Wylde* cited *Everard's* case (1) in Vaughan's Reports, adjudged when he was there in the Common Pleas.

*Pollexfen* argued strongly against it, that the antient way was to plead to every particular judgment; as 9 Co. 109. Dy. 107. 8 Co. 132. Vaughan, 8. 1 Rol. 802.

But for all that, the Court gave judgment *pro quer'* (a).

5 Term Rep. 82.  
2 Saund. 50, n.3.

And *Wylde* said if a judgment of 1000*l.* be pleaded by an executor, and the party replieth, that he that hath the judgment offered to take 500*l.* it is a good replication, and all above 500*l.* shall be assets.

(a) See *Chamberlaine v. Pickering*, ante, p. 28, and note, *ibid.* *Warkehouse v. Symonds*, p. 102, 121. *Gilbert v. Dee*, post, p. 537. *Campion v. Bentley*, 1 Espin. Cases, 344.

( C. 640. )

### BURGES v. PLAYER.

Replication to a plea of *no award* must shew an award made agreeably to the terms of the submission; and *secundum formam et effectum*, &c. is not enough.  
1 Rol. 409.

DEBT upon a bond conditioned for the performance of an award, so as the said award be made, &c. in writing indented and delivered to the said parties, &c.

Upon *Nullum fecerunt arbitrium* pleaded, the plaintiff replies that the arbitrators did make an award in writing, and delivered it to the parties *secundum formam et effectum conditionis*. And ruled to be naught, because he did not say by writing indented; and *secundum formam et effectum conditionis* doth not aid it, because that relates to the delivery to the parties, and so it hath been often adjudged: *Per Wylde. Jud' pro def'* (a).

(a) Acc. *Henderson v. Williamson*, 1 Stra. 116. *Elberough v. Gates*, ante, p. 22. *Jenkinson v. Alison*, p. 415. So the words *duly* and *in due manner* will not remedy a defective statement of the formalities of the award even after verdict; *Everard v. Paterson*, 2 Marshall, 304. *S. C.* 6 Taunt. 645.

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( C. 641. )

### HALL v. HUFFHAM.

*S. C.* 2 Lev. 188, 228. 3 Keb. 737, 798.

The survivor of two joint-

Two joint merchants, and one dies; the survivor and the executor of him that dies join in an action upon the case.

for money for goods sold. And held to be well enough; because they are in the nature of tenants in common, and may join in personal actions, according to *Littleton*; though it may be each might have sued separately for his moiety. 2 Cro. Dr. *Hackett v. Enston*. 38 Ed. 3, 6. 2 Inst. 404 (a). merchants may join with the executor of the deceased, in an action for goods sold.

(a) But see the report in 3 Keb. 798; and in *Martin v. Crompe*, 1 Ld. Ray. 340, the counsel said that "by his own report the plaintiff had leave to discontinue." That the case is not law, see *Martin v. Crompe*, *supra*. 2 Salk. 444. *Kemp v. Andrews*, Carth. 170. S. C. 1 Show. 188. 3 Lev. 290. *Smith v. Stokes*, 1 East, 366, *arguendo*. *Golding v. Vaughan*, 2 Chit. Rep. 437. 16 Viner, 246. 2 Fonbl. Treat. of Eq. 102-3-4, 5th edit.

WHEELER v. ———

( C. 642. )

ERROR in Exeter Court. The error assigned was, that there was no summons, and for that cited 2 Cro. 108, which was said to be the same case with this. Want of summons in inferior court is cured by appearance.

But *per Curiam*:—It was held to be well enough; for by appearance all defaults before are salved, though it be in an inferior Court; and so *Wylde* said it had of late been constantly ruled, contrary to 2 Cro. 108. 2 Rol. 225. Acc. *ante*, C. 394, 397. 2 Ld. Ray. 1543.

WINCH v. HUDDLESTON.

( C. 643. )

*Semb.* S. C. *Anon.* 1 Vent. 332.

WHERE the defendant in ejectment doth appear, and confess lease, entry, and ouster, that shall be sufficient to prove an actual entry in any case where an actual entry is required; and so *Scroggs* said it was always held by Chief Justice *Hale*, because it shall be taken an entry to all intents (a). The confession of defendant in ejectment is sufficient proof of entry, when an actual entry is necessary. 1 Sid. 223.

(a) See *Little v. Heaton*, 1 Salk. 259. 13 East, 489. 3 Maul. & Selw. 271. And see 1 Vent. 248. 2 Show. 201. 1 Barn. & Ald. 85. That an actual entry is sometimes prudent, in order to obviate the stat. of limitations, see *Adams on Ejectment*, p. 93-4, 2d edit.

WISE v. GREEN.

( C. 644. )

S. C. 2 Lev. 186. 3 Keb. 727, 791, 809.

By reason of repairing a chapel of ease, that he had been time out of mind exempted from contributing towards the repairs of the church held a good prescription (a). Prescriptive exemption from repairs of a church, by reason of repairing a chapel of ease, good.

(a) See 2 Rol. Ab. 289, 290. Hob. 66. *Brown v. Palfrey*, 2 Lev. 102. *Ball v. Cross*, 1 Salk. 164-5. *Godfrey v. Evereden*, 3 Mod. 264. *Husly v. Cas-* *sock*, Comb. 132. 17 Vin. 575-6. Com. Dig. Esglise, G. 2. Gibs. Codex, tit. 9, c. 4, in *notis*.

## DE TERM. S. MICH. 1678.

IN BANCO REGIS.

( C. 645. )

HOLMAN v. SENHOUSE.

Continued from p. 461.

A. covenants  
 "that if he  
 shall die without  
 issue of his body,  
 then he doth  
 give, grant, &c.  
 to B., his mo-  
 ther," the lands  
 in question:  
 The conveyance  
 shall enure as a  
 covenant to  
 stand seised.

**EJECTMENT.** Upon a special verdict, the case was, that in an indenture containing several covenants betwixt Sir Henry Godolphin and Mrs. Senhouse, his mother, there was this covenant, "It is covenanted and agreed by and betwixt all the parties to these presents, and the said Sir H. Godolphin doth covenant and agree for himself, his heirs, executors, and administrators, that if it shall happen that he shall die without issue of his body, that then he doth by these presents give, grant, release, and confirm unto the said Mrs. Senhouse the lands in question." Afterwards Sir H. Godolphin did die without issue; and the sole question was, whether this should amount to a covenant to stand seised, so as to raise a use to the mother after the death of Sir Henry?

Serjeant *Raymond* argued *pro quer'*, that it should not.

1. Because, upon the whole contexture of the deed, it doth not appear that the parties did intend to raise any estate, only to covenant; and though the words are, "that he doth give and grant," yet that is no more in common parlance than if he had said, "that he will give and grant;" as in common speech we say "to-morrow is a feast," that is as much as to say "to-morrow will be a feast."

[ \*470 ]

\* 2. If there had been an intent, yet uses must be guided by the rules of the common law, and so is Doct. and Stud. ch. 54. 1 Co. *Chudley's* case. And by the rules of the common law, a man cannot by a deed convey an estate of freehold to another, reserving to himself an estate for life; neither can a freehold commence *in futuro* without a particular estate to support it; and he cited Pop. 21. *Sir Fran. Englefield's* case, Dy. 296, pl. 22. Cro. Eliz. 345. 1 Co. 129. Win. 61. Dy. 96. 2 Roll. 788, 789. March Rep. Plow. 155; and a case adjudged in this Court, Hil. 14 Regis, *Foster v. Foster*, Term. Trin. 1661, Rot. 721. [S. C. 1 Lev. 55. T. Ray. 43.]

*Pollexfen e contra*:—In raising uses the law is not so strict as it was in passing an estate at common law; for before the statute of uses, a use was not any interest in the land, but it was the office of the Chancery to enforce the execution of an estate where there was a use in being; and what the Chancery did then is now done by the statute which executes the possession to the use; and whether the parties intended to pass the estate by a covenant to stand seised or not, is not material; for we see in *For's* case, 8 Co. 93, that, though a man for money covenants to stand seised to the use of another.

But he admitted, that if it did plainly appear in the deed, that the intent of the parties was to pass the estate by conveyance at common law, as if there be a letter of attorney in the deed to make livery, there an use shall never rise, though it be made to a son, because the apparent intent of the parties is otherwise.

When the plain intent is to pass an estate by a conveyance at common law, no use shall arise upon a deed.

*Adm. arg. (a).*  
1 Inst. 49. 2 Co. 37. 2 Rol. 786.

And he said that an use may rise *in futuro*, and upon a condition precedent, well enough. 1 Co. 99. 2 Roll. 791. Cro. Car. 439.

And he said this differed from the case of *Pitfield* and *Peirce*, 2 Roll. 789, cited by the other side; for there, if the use had risen, the covenantor had been presently tenant for life, which should not be by construction contrary to his intent; but here this use is to rise upon a contingency, for death is certain, but it is uncertain whether or no a man shall die without issue; and he cited the case of *Pybus* and *Mitford* (1), but relied chiefly upon the case of *Crossing* and *Scudamore* (2), in Case 629. *Cur adv. vult (b)*.

22 Viner, 212.

(1) *Ante*, p. 369.  
(2) *Ante*, p. 368.

(a) Acc. 2 Vent. 318. T. Jo. 123. Fonbl. Treat. of Eq. B. 2, c. 3, § 1. But see *cont. Roe v. Tranmarr*, Willes, 686. S. C. 2 Wils. 75. And see Hawk. Abr. Co. Lit. 49, a. 2 Thomas's Co. Lit. 352-3. *Roe v. Archbishop of York*, 6 East, 105-6.

(b) Held, that the conveyance amount-

ed to a covenant to stand seised. Judgment was affirmed on error. 2 Show. 15. Pollexf. 537. See the references in the note to *Crosse v. Scydamore*, *ante*, p. 368-9. *Doe v. Whittingham*, 4 Taunt. 20. Com. Dig. Covenant, G. 2. Viner's Abr. Uses, (B). a.

[ 471 ]

### SIR RALPH DUTTON & UX' v. SIR NEVILL POOLE.

( C. 646. )

S. C. 1 Vent. 318, 332. T. Jo. 102. 2 Lev. 210. T. Ray. 302. 3 Keb. 786, 814, 830, 836.

**ACTION *sur le case*.** The defendant's father had an intention to cut down a grove of oaks to provide portions for his younger children, whereof the plaintiff's wife was one; and the defendant, in consideration he would forbear to fell the said timber, did promise his father, that he would give the plaintiff's wife (being his sister) 1000*l.*, for which she and her husband brought this action.

The defendant's father being about to fell timber to raise a portion for his daughter, the defendant, in consideration that he would forbear to do so, promised his father to pay her 1000*l.* The daughter may sue the defendant upon this promise.

The sole question was, whether the daughter could bring this action, or whether it ought not to have been brought by the father; because although the promise was made for the plaintiff's benefit, it was made to the father?

*J. Wylde* said, he knew no case where any party could maintain an action of this nature; but it must either be the party to whom the promise was made, or else the person from whom the meritorious consideration did arise; as if I promise A. that if his son will marry my daughter, I will give his son 100*l.* if the son marrieth, he may bring the action, because the meritorious consideration, which is the marriage, ariseth from the son. *J. Jones* :—If it were a covenant by a deed to pay money to a third person, the covenantee must bring the action, and the other is put to his remedy in equi-

A. covenants with B. by deed, to pay money to C. C. has no

remedy by  
action at law  
against A. (a).

ty; yet it was agreed that an use may arise upon a bargain and sale where the money is paid by a third person. But to that it was answered, that there is not that privity requisite to the raising of an use as is to the bringing of an action. *Trinder* agreed with *Wylde*, that where the consideration is an act to be done, if the party for whose benefit the promise is made be not concerned in the doing of the act, he shall not bring the action; but where the consideration is a non-feasance, or the forbearing the doing of some act, which forbearance is to the prejudice of the third person, as it is here, there the party may bring the action, for here the selling of the timber was intended to be a provision for his children.

Post, p. 478.

[ \* 472 ]

Ch. Just. inclined, and so did the rest at last, for the plaintiff; and they said, if it would any ways agree with the rules of law, they would not put the person to go into Chancery; as he must in this case, if this action will not lie, to enforce the executor of the father to bring this action, \* and then to have the money decreed to them. *Cur. adv. vult. Vide Hetly, 176. 1 Roll. 31 (b).*

(a) Acc. *Gilby v. Copley*, 3 Lev. 138. *Dering v. Farington*, ante, p. 368. *Pigott v. Thompson*, 3 Bos. & Pull. 149, n. (a). *Storer v. Gordon*, 3 Maul. & Selw. 322. *Barford v. Stuckey*, 2 Brod. & Bing. 333-5.

(b) Judgment for the plaintiff, which was affirmed on error in the Exchequer Chamber. 2 Lev. 212. T. Ray. 302. From the other reports we collect that the objection was taken in arrest of judgment; that the defendant was heir apparent to his father, although this did not appear on the record, 1 Vent. 332-3; that the promise in the declaration was laid to have been made to the father, T. Ray. 302; that the court laid some stress on the nearness of relationship, which was held to extend to the daughter the advantage of the consideration and promise; and that it might have been otherwise if the plaintiff, to whom the money was to be paid, had been a mere stranger. 2 Lev. 211. 1 Vent. 333, and see 1 Vent. 6-7.—That the representatives of the father might have sued, see S. C. T. Ray. 303. *Bell v. Chaplain*, Hardres. 321, and see March. 73. From Levinz we learn that *Wylde* and *Jones* were against the action upon the first argument, and *Twisden* and *Rainsford*, C. J. in favour of it: afterwards two new judges, *Dolben* and *Scroggs*, were substituted in the places of the latter, whose opinion was also for the plaintiff, and with whom *Jones* and *Wylde* finally concurred. The justices and barons in the Exchequer Chamber were unanimous. T. Ray. 303. In *Martyn v. Hind*, Cowp. 443, Ld. Mansfield said, that “as to the case of *Dutton v. Poole*, it is matter

of surprise how a doubt could have arisen in that case.” In *Barford v. Stuckey*, 2 Brod. & Bing. 336, Park, J. said “he found it difficult to understand the reasoning of it;” but *Burrough*, J. thought “it was rightly decided,” and that the consideration was “undoubtedly sufficient.” *Ibid.* p. 337. On the question, whether a party, beneficially interested in a parol contract *inter alios*, can support an action at law upon that contract, and whether it be a necessary rule of law that the meritorious consideration should arise or move from the plaintiff, see the cases cited from Rolle’s Abr. in 1 Viner, 333-6, and in Com. Dig. Action upon *Assumpsit*, B. 13, E. F. 8. *Sadler v. Paine*, Savil. 23. *Bell v. Chaplain*, Hardr. 321. *De la Bar v. Gold*, 1 Keb. 64, per *Windham*, J. *Rookwood’s case*, Cro. El. 163. S. C. 1 Leon. 192. *Crew’s case*, 2 Leon. 205. *Levet v. Hawes*, Cro. El. 619, 652. *Jordan v. Jordan*, Cro. El. 369. *Bourne v. Mason*, 1 Vent. 6. *Pine v. Norris*, cited 1 Vent. 318. 2 Lev. 211-2, and the observations in Buller’s Ni. Pri. 134. *Martyn v. Hind*, Cowper, 437. *Crow v. Rogers*, 1 Stra. 592. *Marchington v. Vernon*, 1 Bos. & Pull. 101, n. (c). *Pigott v. Thompson*, 3 Bos. & Pull. 149, and note, *ibid.* *Barford v. Stuckey*, 2 Brod. & Bing. 333. And see *Browne v. London*, ante, p. 14, and notes, *ibid.* *Corney & Curtis v. Collidon*, p. 284-5. *Dutton v. Poole* is also cited in *Oldham v. Litchford*, 2 Freem. 284. *Lowther v. Kelly*, 8 Mod. 115. *Gilby v. Copley*, 3 Lev. 139. *Bowen v. Morris*, 2 Taunt. 382. 1 Fonb. Treat. of Eq. p. 70, n. (u), 5th edit. In the *Company of Feltmakers v. Davis*, 1 Bos. & Pull. 102,



*Eyre*, C. J. is reported to have said that "in the case of a promise to A. for the benefit of B., and an action brought by B., there the promise must be laid as being made to B., and the promise actually made to A. may be given in evidence to support the declaration." Acc. *Jordan v. Jordan*, *supra*, and in *Martyn v.*

*Hind*, the promise was so laid. But in the above case of *Dutton v. Poole*, the declaration stated a promise to the father and not to the plaintiff, and this, according to *Bell v. Chaplain*, Hardr. 321, is the proper form of pleading. In *Legate's case*, Latch, 206, either way of declaring was said to be good.

### JAMES v. RICHARDSON.

( C. 647. )

Continued from p. 459.

Now this case was argued by Serjeant *Pemberton*, that this should be a contingent remainder, and should not vest an estate immediately in John the son of Robert. It is objected, that the word "heir" is not always taken properly, but is used often to signify the person that probably will be heir; as in common parlance we say, such an one is the son and heir of J. S.; and so in the statute of Ed. 3, the prince is called the son and heir, and sometimes in writs which are used in propriety of speech, the writ *Quare filium et hæredem cepit* lies by the father; all which cases were admitted by Serjeant *Pemberton*; but he said no one case could be produced where "heirs" in the plural number was ever used in an improper sense to make a man a purchaser. He admitted, if it had been, after the death of Robert, to the "heir male" (in the singular number) "of the body of Robert now living," that this might have been taken to be *descriptio personæ*, and intended the son John, so that he should have taken presently; and he said, that this may here be taken in a proper sense; and very well answer the intent of the devisor; for when he deviseth it to the heirs male of the body of Robert now living, and then to other heirs male and female by him to be begotten, this is no more than the common case when it is *hæredibus procreatis et procreandis*; and for the case of *Lisle v. Gray*, cited by the other side, he said, that is not like this case; for there, after the limitation to the first and second son, it is to every other heir male of the body, &c. There the word "every" makes it as though it had been limited to the next son; but if that word had been out, without question it had been an estate-tail in that ancestor after the first and second son had been dead without issue.

"Heirs male of the body of A. now living" is a good *descriptio personæ* in a devise, and A.'s son and heir apparent may thereby take a vested remainder during the life of A.

*Ante*, C. 630.

And it was urged, that if they would have *heirs male* in this case to amount to *descriptio personæ*, then it could give John the son but an estate for life; for otherwise the same words must, in the same sentence and at the same time, be taken improperly to design the person, and yet properly so as to create an estate-tail. *Cur. adv. vult (a)*.

(a) Judgment in favour of the son and heir, which was reversed in the Exchequer Chamber: see the reason in *T. Ray*. 334, in marg. But the judgment of the Exchequer Chamber was after-

wards itself reversed in the House of Lords. 2 Lev. 232-3. The same point was decided in another action of ejectment upon the same devise, in the case of *Burchett v. Durdant*, in B. R., and

affirmed upon successive writs of error in the Exchequer Chamber and Parliament. See 2 Vent. 311. Comb. 153. Carth. 154. Skin. 205. And see further *Darbison v. Beaumont*, 1 P. Willms. 229. *Newcomen v. Barkham*, 2 Vern. 729. *Dawes v. Ferrers*, 2 P. Willms. p. 1. *Bagshaw v. Spencer*, 2 Atk. 570-5. S. C. 1 Coll. Jurid. 389, 390. *Goodright v. Wright*, 2 W. Black. 1010. *Marwood*

*v. Darrel*, B. T. Hardw. 91. *Cholmondeley v. Clinton*, 2 Meriv. 171. S. C. 2 Jac. & Walk. 1. 2 Barn. & Ald. 625, and the cases cited in the note to *Lisle v. Gray*, ante, p. 462. 1 Fonb. Treat. of Eq. 428. 2 Fonb. Treat. of Eq. 72-3, 5th edit. Fearn's Cont. Rem. 209-212, 7th edit. Hargr. Co. Lit. 24, b. n. 3. 8 Viner, tit. Devise, U. b. W. b. 14 Viner, tit. Heir, G. 3.

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( C. 648. )

## HOWARD v. WOOD.

S. C. 2 Lev. 245. T. Jo. 126. 2 Show. 21. 2 Mod. 173.

See marg. p. 478. *INDEBITATUS Assumpsit*. In the honour of P. there was a court-leet and a court-baron, and after the death of A. the present steward, the stewardship of the honour was granted to the plaintiff and his son; A. dies; the defendant keeps the court-baron, and received the fees, and the plaintiff brought this action as for money received to his use. Two questions were made,

1. Whether the grant of this office in reversion were good, or not?

2. Admitting that it were, whether or no a general *indebitatus* as for money received to his use, would lie or not?

To the first point it was argued by *Holt pro quer.* that although the lord cannot grant the reversion of such an office as this, because he hath no reversion in him, yet it may be granted in reversion; but the reversion of an office cannot be granted, but where a man hath the inheritance of an office, and a particular estate is granted out; but here the lord hath no reversion of the office, for he cannot be officer to himself, but hath power to constitute an officer in reversion.

18 Edw. 4, 7.  
15 Edw. 4, 16.  
11 Co. 4. Cro.  
Car. 280, 556.  
Dy. 207, 259.

He admitted that judicial offices could not be granted in reversion, because they ought to be granted to persons able to execute the place; but ministerial offices might be granted in reversion; for there, if the person who is the grantee be not capable, he may constitute a deputy who is; and therefore in this case he held, that though this grant was void as to the stewardship of the court-leet, yet it may be good as to the stewardship of the court-baron; for in the court-baron the steward is only a minister, and the suitors are the judges; but in the leet the steward is judge.

Post, p. 525.

And this may be good for one, though it be void for the other; for they are two distinct courts, and may be kept at several times and by several persons, and have no dependancy upon one another as to the nature of them, though for conveniency they are many times kept together. And this is not like auditor *Curle's* case, 11 Co. 2; for although that office was partly judicial, and partly ministerial, yet it was one intire office.

2. To the second he argued, that an *Indebitatus* as for

money received to the plaintiff's use would well lie, for al-  
 \*though there was no consent that the defendant should re- [ \* 474 ]  
 ceive this money for him, yet a subsequent assent is equiva-  
 lent. 3 Leon. 24. Cro. Car. 141. And this very case was  
 adjudged in the Exchequer betwixt Dr. *Arras* and *Stuke-*  
*ly* (a), where such an action was brought for the profits of  
 the office of comptroller of the port of Exeter; and in the  
 case of *Woodward* and *Aston* (1), tried at bar in the Lord  
 Ch. J. *Hale's* time. (1) *S. C. ante*,  
 p. 429.

*Bigland* argued *pro def'* that a general *indebitatus as-*  
*sumpsit* will not lie, but where there is *quasi* a contract or  
 agreement of the parties; as if another pays money to J. S.  
 to my use, there J. S. doth agree to pay it to me by con-  
 struction of law, when he receives the money; but where a  
 man receives it as due to himself, it will be hard to make this  
 an agreement by construction whether he will or not; for so  
 if a man should rob me, by that reason I might maintain this  
 action.

*Post*, p. 479,  
*S. P. per Scroggs*  
*C. J.*

2. To the second point he held, that the grant of this of-  
 fice of steward in reversion was naught; for although the  
 suitors be judges, yet the steward is well known to be the di-  
 rector, and ought to be a man of knowledge, &c. Dy. 259.  
 Hob. 150. And this being granted to two jointly and sever-  
 ally is naught; for this office cannot be granted so, for it  
 would breed confusion. 18 Ed. 4, 7. 2 Rol. 152. *Adjournatur*. [*S. C. Post*, p. 478.]

(a) *S. C.* 2 Mod. 260, and in the *Regula Placitandi*, p. 192.

### MORRIS v. WILFORD.

( C. 649. )

*S. C.* 2 Lev. 214. T. Jo. 104. 2 Show. 46. 3 Keb. 814, 840. 2 Mod. 108.

COVENANT. The case was: Alderman Sterling had cove-  
 nanted, and broke his covenant in his life-time, and dies, and  
 makes the defendant executor. The plaintiff releases all his  
 right and demand to the testator's estate, and brought this  
 action of covenant; and the defendant, who was the execu-  
 tor, pleaded this release. And the question was, whether  
 this release was a good bar to the action of covenant, or  
 whether it should only be extended so as to bar the plain-  
 tiff's claim to any of the estate *in specie*? *Adjournatur* (a).

Whether a  
 release of all  
 demands on the  
 testator's estate  
 will bar an action  
 against executor  
 for a breach of  
 covenant by  
 testator?

(a) Judgment for the plaintiff *per*  
*totam Curiam*. See the report of Levinz,  
 where it appears that the release, though  
 containing general words, was restrained  
 to the particular purpose for which it was

executed. Co. Lit. 265, b. *Topham v.*  
*Tollier*, 2 Ld. Raym. 786. *S. C.* 2 Salk.  
 575. And see *Hayes v. Bickerstaff*,  
*ante*, p. 194-5, and references in note (a),  
*ibid*.

( C. 650. )

MEMORANDUM, That Mr. Saunders told me a case that he  
 was advised with upon, that a mortgage was made by a lease  
 for 500 years; and the mortgagee, designing that the mort-

Mortgagor re-  
 leases to mort-  
 gagee for years  
 "all his right,

[ \* 475 ] gagor should release unto him his equity of re\*demption title and interest to make the term absolute, obtained a release from the mort- in the land:" gagor, whereby he released all his right, title, and interest, the term is there- in the land; which release did extinguish the term for years, by turned into and turned it into an estate for life; for no estate being ex- an estate for life. pressed, it is intended an estate for life.  
Acc. Litt. sect.  
465. Co. Lit.  
273, b.

## ( C. 651. )

*Cestui que use* can have no advantage of an estoppel in the deed of feoffment to uses.  
*Per Saunders.*

A. MAKES a feoffment by deed indented to B. of Black Acre, in which he hath nothing, to the use of C. and the heirs of his body, remainder to B. and his heirs; and after purchases Black-acre.

*Per Saunders*:—C. can take no advantage of an estoppel in this case, because he comes in by the statute of uses.

## ( C. 652. )

No costs upon *non pros.* in debt for treble value of tithes.

IN an action of debt upon the statute of 2 Ed. 6, a *non pros.* was entered against the plaintiff for want of proceeding. And *Pollexfen* for the defendant moved for costs, upon the statute 4 Jac. c. 3. But, *per Curiam*, he shall have none; for if the plaintiff had been nonsuit at the assises, he should have none; and there is less reason here, when the defendant hath not been put to so much charge (a).

(a) See 2 Inst. 651. 8 & 9 Will. 3, c. 11, § 3.

## DE TERM. S. TRIN. 1679.

IN BANCO REGIS.

## ( C. 653. )

*Quære S. C. R. v. Thacker, T. Jo. 121?*

*Semb.* an officer must take the oaths agreeably to the corporation act at his

[ \* 476 ] peril, although they be not tendered to him; and in default thereof his election is void and not voidable only.

STAT. 13 Car. 2, cap. 1, sess. 2. Upon this statute two points were argued;

1. Whether a man should incur the penalty of the statute, so that his office should be void, if the oath were not tendered to him? And it was argued by *Holt* that \* he should not; because in the preamble of the said statute it is said "for tendering the oath, &c." which seems to import, that the oath ought to be tendered. But to that Mr. *Attorney*, who argued *è contra*, answered, that *tender* in that place was tantamount to *give*, and when the statute says "administer and tender," it is all one as if it had said "administer and give" the said oath; and he said, if this construction should be admitted, the intent of the statute might be evaded; for if the magistrates were wilful or neglectful, and would not tender, the statute would signify nothing. And the Court seem-

ed to incline that it need not be tendered, but the party was to take it at his peril.

2d. Point, Whether, (admitting that the party ought to take it without any tender) if he did take it before any advantage was taken of it, that would not be sufficient to avoid the penalty, though he took it not within the time limited by the statute? And *Holt* urged, that though it is said, "that such placing, &c. shall be void," yet the meaning of that is *Ante*, p. 328-9. no more than that it shall be *voidable*; as in the statute of outlawries, and several others.

But to that the Court inclined, that it was absolutely void; for this is stronger than if the statute had said "the place or office shall be void," for then perhaps it might be intended that a legal course must have been taken to remove the party from his office; but here it is said "the placing and election shall be void." *Sed adjournatur* (a).

(a) Acc. on the point of tender, *R. v. 1, c. 6. See Crawford v. Powell*, 2 Burr. 513. That the election may be valid as to strangers, see *Hawk. P. C. B. 1, c. 8, sect. 3.* *Staford*, 5 Mod. 316. *R. v. Mayor of Oxon.* 2 Salk. 429. Contra, *Denning v. Norris*, 2 Lev. 243. The above act is qualified by the later statute of 5 Geo.

### HOWE v. WHITEBANCK.

( C. 654. )

*S. C. How v. Whitfield*, 1 Vent. 338-9. T. Jo. 110. 2 Show. 57.

UPON a fine, the use of lands was limited to A. for eighty years, with a power to A. and his assigns to make leases for three lives, to commence after the determination of the said term. A. assigns over to B., B. dies and makes C. his executor, who assigns over to D. who made the lease for life, which was the estate in question.

A power of leasing given to A. and his assigns, may be well executed by the assignee of the executor of A.'s assignee.

And the question was, whether or no D. was such an assignee of A. as had power to make this lease, or whether it should extend only to the immediate assignee of A.? and the doubt in this case was the greater, because here was a descent upon an executor, who made the estate over to him who made the lease. And the case in *Hob. 9, Pease and Styleman* was cited, where an executor or an administrator in some cases shall not be said to be a special assignee. But all the Court seemed to incline to the contrary, and that D. shall be said an assignee well enough to this purpose; and so shall any person that comes to the estate under the first lessee, though there be twenty mean assignments. And afterwards in Michaelmas term following judgment was given accordingly (a).

[ \* 477 ]

(a) See Butler's note to Co. Lit. 110, a. 2 Vern. 181. 13 East, 128. 3 Viner, 156. In what cases an executor shall be deemed an assignee, see *Spencer's case*, 5 Co. 18, 7th resol. 11 Viner, 156-9. *Doe v. Bevan*, 3 Maul. & Selw. 358.

( C.655. )

STEEDE v. BERRIER.

See S. C. in the Common Pleas, *ante*, p. 292.

A WRIT of error being brought to reverse this judgment, it was argued for the plaintiff in the writ of error by Serjeant *Baldwin*, that this parol declaration could not carry the land to the grandson; for although it may be in a will lands might pass to a grandson Robert by the name of my son Robert, because it might sufficiently declare the devisor's mind; yet here it is plain the testator by these words meant his son Robert who is now dead, and so cannot carry the lands to the grandson.

Dyer, 143.

Mr. *Solicitor* argued for the defendant, that this devise was good; for it is expressly found, that the devisor, at the time he published this declaration, did make a new publication of his will; and when a will is new published, it is all one in every respect as though the will had been new made; and if he had new made his will, it is admitted that these words might have been sufficient; and the same reason there is they should be so now; and compared it to the case in the commentaries of *Bret v. Rigden* (1), where a man deviseth all his land, and then purchaseth other lands, and then new publisheth his will, there the new purchased lands shall pass well enough; which was agreed by all.

(1) Plowd.  
340-4.

But *Scroggs*, Ch. J. said, that is not like this case; for there he could not have more properly expressed himself than to say "all his lands;" (and if he had writ it over again, it had been but to write the same words over again;) but in this case he might, and have named him his grandson.

*Ante*, p. 292.

And besides, here the testator hath distinguished his son from his grandson; for he hath given him a legacy in this will, and called him his grandson; and if the defendant should carry the lands in this case, it is merely good luck that his name was Robert; for if his name had been Thomas, it is agreed, notwithstanding a declaration that his grandson Thomas should have the lands devised to his son Robert, that the lands should not have passed; and so he seemed [ \* 478 ] strongly to be of his former opinion whereof he was; \* and *Jones* and *Pemberton* seemed to concur with him; but *Dolben* inclined in contrar'. *Adjournatur* (a).

(a) The judgment was reversed, (*dis-sent. Dolben, J.*) see the other reports cited, *ante*, p. 292. Sir T. Raymond in his report, p. 409, says, that "Scroggs, C. J., Jones and myself," were for revers-

ing the judgment; but by this and the other reports, Pemberton was the fourth judge. Pollexf. 552. See the note to *Harrison v. Belcher*, *post*, p. 485.

( C.656. )

HOWARD v. WOOD.

Continued from p. 474.

*Indebitatus assumpsit* lies at the suit of one entitled to an

INDEBITATUS *assumpsit*. And it was argued by *Williams pro quer'*; and he chiefly relied upon Justice *Rolle's* case, that an *indebitatus assumpsit* would lie in this case; for there



in the late times certain persons received his rents by authority under the commissioners, and the times changing, he brought this action for those rents received by them; and held that it would lie well enough; and there have been several judgments since subsequent to that resolution; and he said, that it lieth well enough in the breast of the Courts here to alter the law, so as to advance remedies for the recovery of right, as they have done in the proceedings in ejectment, &c. And here is no injury to any person, but a more expedite way for the recovery of a due than a special action of the case.

office, against an usurper who has received the fees. *Quare*, whether the stewardship of an honour containing a court-leet and a court-baron may be granted in reversion? Skin. 43.

It was argued *pro def'* by the *Attorney-General*: and he would not admit that point, that a ministerial office might be granted in reversion by any subject, though it might by the king by his prerogative. Dy. 80. Hob. 150, 151. Though in Cro. Car. the case of *Young v. Stowell* was contrary; but he said all that case was not law; for whereas it is held there, that an infant is capable of the grant of an office, which is expressly contrary to 1 Inst. 3; but he said, he would not rely upon that point (a).

And whereas it was urged by Mr. *Williams*, that if the remedies were more easy at law, it would prevent the multiplicity of suits in Chancery;

To that he answered, that that was no reason why the Court should take upon them to change the law; for there are many cases where the Chancery gives relief, though the common law doth not; as these, *Ante*, p. 471.

The heir shall receive the mean profits before his entry.

The executor shall be charged for the *devastavit* of his testator, &c.

2. To the second point he argued, that this action would not lie; for that, when the defendant received these profits claiming them to his own use, there is no privity between the plaintiff and the defendant.

He admitted, that if another receive money to my use, without my order, yet if I afterwards assent to it, this \* creates a privity, and an account will lie. Nat. Brev. 116, 117. 12 H. 7, 26. 22 Ed. 4, 5. But if he enter and receive the profits, claiming them to his own use, there it is otherwise. 33 H. 6, 2. Bro. Account, 8, 89. 49 Ed. 3, 10.

[ \* 479 ]  
*Ante*, p. 14,  
C. 13.

And he said, that though here were two acts to be done, whereof one was judicial, as to be steward of the court-leet; and the other ministerial (b), of the court-baron, yet the office was but one, viz. steward of the honour, which was an intire office; and therefore if it were void for part it must be void for all; and though one part be judicial, and the other ministerial, yet this doth not make it two offices; for the of-

(a) See the case of *Young v. Stowell* or *Fowler* remarked upon in *Claridge v. Evelyn*, 5 Barn. & Ald. 86.

(b) That the steward of a court-baron

is not merely a minister of the court, see *Holroyd v. Breare*, 2 Barn. & Ald. 473; and see *Browne v. Hartshorne*, *ante*, p. 19, and note (a), *ibid*.

fice of Chief Justice in this Court hath something ministerial in it, as to carry the transcripts of records into parliament, &c. and yet no body will say that these are two offices.

To the point of the grant of the office the Court said nothing (c).

To the gist of the action *Scroggs*, Ch. J. inclined against it; for he said, a man may as well bring an *indebitatus assumpsit* where another takes money by force from his person; or where he takes away my horse, or for any account whatsoever.

The other three Judges said, that there had been several cases that had been adjudged so since the judgment in Sergeant *Rolle's* case. And *Pemberton* said, he did not know why the Court might not as well allow this action in this case, as the Judges did an action of trespass upon the case for a debt in *Slade's* case, 4 Co. for there they allowed an action proper for a wrong, for the recovery of a right; and here we shall allow an action proper for the recovery of a right, to remedy a wrong. *Curia advisare vult* (d).

(c) It was resolved that the grant was good as to the court-baron at least; and the court distinguished between an entire office, comprehending functions partly judicial and partly ministerial, and two distinct offices (as in the principal case), granted under the common name of steward. And they seemed to be of opinion, that a judicial office in an inferior court, which might be exercised by deputy, and required no personal attendance, was grantable in feversion. See T. Jo. 126-7. 2 Show. 25. S. C. And see further *Willoughby v. Foster*, Dy. 80, b. and note (58), *ibid.* Harg. Co. Lit. 3, b. n. (5). Com. Dig. Officer, B. 13, 14.

(d) The plaintiff was suffered to prevail in this form of action, although the Court intimated that their determination would have been different, if the case had been an original one. (See the other reporters). *Ld. Holt*, in *Lamins v. Dorrell*, 2 *Ld. Raym.* 1217, said, that "these actions had crept in by degrees. He remembered in the case of Mr. *Aston*, in a dispute about the title to the office of clerk of the papers, there were great counsel consulted with; and Sir *W. Jones* and Mr. *Saunders* were of opinion an *indebitatus assumpsit* would not lie, upon meeting and conferring together and great consideration." The case here referred to is no doubt that of *Woodward v. Aston*, ante, p. 429. *Indebitatus assumpsit* for money had and received is now therefore the usual mode of trying the title to an office to which fees are annexed: See *Mayor of London v. Gorey*, ante, p. 433. *Shuttleworth v. Garnet*,

3 *Lev.* 261-2. *Sir R. Rains v. Commissary of Canterbury*, 7 *Mod.* 147. *Powell v. Milbank*, 1 *Term Rep.* 399, n. (d). *Boyster v. Dodsworth*, 6 *Term Rep.* 681. *Green v. Hewett*, Peake, N. P. 182-5. In evidence, it will be unnecessary to shew every particular sum received: proof of the profits *communibus annis* will be sufficient. *Ld. Montague v. Ld. Preston*, 2 *Vent.* 171. Buller N. P. 76. *Assumpsit* for money had and received lies in numberless instances, where the defendant claims title to receive the money in opposition to the plaintiff's right: no privity or promise is necessary to sustain it, but the receipt is deemed to enure to the use of the party who is lawfully entitled to it. *Moses v. Macferlan*, 2 *Burr.* 1008-9. *Philips v. Hunter*, 2 *H. Black.* 408. The following are some of the modern cases in which the right of redressing a tort by an action in form *ex contractu* has been discussed: *Hambly v. Trott*, *Cowp.* 371. *Lindon v. Hooper*, *Ibid.* 414. *Thorp v. How*, Bull. N. P. 130. *Hill v. Perrott*, 3 *Taunt.* 274. *Thomas v. Whip*, Buller N. P. 130. *Semb.* S. C. *Lofft*, 208. *Kitchen v. Campbell*, 3 *Wilson*, 304. *Anon. Lofft*, 320. *Longchamp v. Kenny*, *Dougl.* 137. *Bennet v. Francis*, 2 *Bos. & Pull.* 550. S. C. 4 *Espin.* 28. *Birch v. Wright*, 1 *Term Rep.* 378. *Smith v. Hodson*, 4 *Term Rep.* 211. *Lightly v. Clouston*, 1 *Taunt.* 112. *Brown v. Hodgson*, 4 *Taunt.* 189. *Sills v. Laing*, 4 *Campb.* 81. *Foster v. Stewart*, 3 *Maul. & Selw.* 191. *Hughes v. Thomas*, 13 *East*, 474. *Graham v. Tate*, 1 *Maul. & Selw.* 609. *Edmeads v. Newman*, 1 *Barn. & Cressw.* 418. *Lee v.*

*Shore, Ibid.* 97. *S. C.* 2 Dowl. & Ryl. 198. This privilege of waiving the tort may sometimes be of importance to the plaintiff, from the opportunity it gives him of obviating the effect of the maxim *actio personalis moritur cum persona*. 3 Maul. & Selw. 202. It is also in some respects beneficial to the defendant, for it enables him to plead a set-off (1 Taunt. 115), and precludes the plaintiff from giving evidence of special damage, circumstances of aggravation, and other matters which frequently augment the damages recovered in an action *ex delicto*. 3 Maul. & Selw. 202. 1 Taunt. 114, &c.

It has been seen in the above report of *Howard v. Wood*, that the court partly relied upon Serjt. Rolle's case, who recovered the rents of his estate received by the commissioners during the usurpation in an action of *indebitatus assumpsit*; from which it seems to follow that the title to land may be tried in an action for money had and received against one who has received rent from the tenant under an adverse claim; and this notion is favoured by the following authorities: Bro. Ab. Accompt. pl. 65. *Tottenham v. Beddingfield*, 3 Leon. 24. *Arris v. Stukely*, 2 Mod. 263. *Mayor of London v. Gorey*, ante, p. 433. *Lamine v. Dorrel*, 2 Ld. Ray. 1217. *Hasser v. Wallis*, 1 Salk. 28. *Hussey v. Fiddal*, 12 Mod. 324. *Lightly v. Clouston*, 1 Taunt. 115,

*Per Heath, J. Drew v. Fletcher*, 1 Barn. & Cressw. 283. In *Sadler v. Evans*, 4 Burr. 1984. *S. C.* Bull. Nl. Pri. 133, the same point was apparently admitted, though the action in that instance was brought against the wrong person. However, in *Cunningham v. Laurents*, reported in Gwillim's notes to Bac. Ab. tit. Assumpsit, (A), *Wilson, J.* nonsuited the plaintiff in such an action, and held the proper remedy to be against the tenant himself, who had made the wrongful payments; and the cases of *Lindon v. Hooper*, Cowp. 414, and *Morgan v. Ambrose*, Peake's Evid. 274, 4th edit. though not strictly in point, look the same way; see also 1 Viner, 140-1-2-3, and the case of *Marshall v. Hopkins*, 15 East, 313-4. It may be observed, that the case of a contested claim to an office is distinguishable from a disputed title to land in this respect, viz. that the payment of fees to an officer *de facto* will generally discharge the party paying them from further liability (Com. Rep. 152), so that no election is left to the rightful claimant, but to seek his remedy against the intruder. And possibly this may have been the reason of the judgment in Serjt. Rolle's case; for the payment to the parliamentary sequestrators may have been considered sufficient to discharge the tenant: see the case in Clayton's Rep. p. 129, cited in 12 Viner, 193, pl. 11.

### REAKE v. LEA.

( C. 657. )

*S. C. Freake v. Lee*, 2 Lev. 249. T. J. 113. 2 Show. 36. Pollexf. 553.

A. BEING seised of 10*l.* *per annum*, lands in possession, and the reversion of 34*l.* *per annum* more expectant upon an estate for life, devises a legacy of 20*l.* to B. to be paid in twelve months out of his lands, and devises 50*l.* to C. to be paid in two years, and 50*l.* to D. to be paid in the space of two years out of his lands; and having two sons, William his eldest, and Richard the younger, devises all his lands to Richard, who did not pay the legacies within the time.

\* Two questions, 1. Whether Richard had an estate for life or in fee, by the devise.

And it was argued *pro quer.* (who claimed under William) that he had but an estate for life; for when it is said to be paid out of the lands, it is all one as out of the profits of the lands; and this difference was alleged and allowed, that where a devise is made to another paying a collateral sum, there it carrieth a fee by implication; but if it be to be paid out of the profits of the lands devised, there a fee shall not pass by implication. Dy. 371. Moor, 464. 6 Co. 16. *Collier's case*, Cro. Car. 157. [1 Rol. 833.]

2. Whether, admitting it a fee to Richard, it were not

A. devised all his lands to his younger son, charged with legacies to be paid within a certain time out of the lands, and amounting to more than the

[ \*480 ] profits of the lands during that time: Held, *first*, that an estate in fee passed to the son; *secondly*, that the payment of the legacies was a trust and not a condition.

conditional; for many words in a will shall make a condition that in a deed will not. 1 Inst. 204 a. Dy. 163.

*Saunders pro def'* argued that it was a fee, because here being but 10*l.* *per annum* in possession, and 20*l.* to be paid in a twelvemonth, it is not possible the devisor could intend that it could be paid out of the profits; and it is not to be supplied by a supposition, that the 34*l.* *per annum* might fall in, for that is a very foreign intendment.

2 Show. 41.

To the second point he held, that there was no condition annexed to the estate, but only a trust in the devisee to pay these legacies; and that construction shall be best taken that is most advantageous to the legatees, that the will of the devisor may be fulfilled; and it is more beneficial for the legatees that the land stand chargeable in the hands of the devisee, for there, if he aliens, the charge in equity will follow the estate, for no purchaser can come in under the title of the will without taking notice of the legacies given by the same will.

2 Freem. 136,  
278.

But if the heir should alien, the alienee without notice would not be chargeable in equity; and he might die, and not leave assets, and then the legacies are lost; so that it is more dangerous to the legatees, that this should be construed a condition to vest the estate in the heir, than that it should be taken for a trust in the devisee.

And the Court did incline in both points with *Saunders pro def'*.

For the first point, they all agreed that a fee was devised, because it did appear that the sum to be paid was more than the profits of the land would amount unto in that time (a).

[ \* 481 ]

And for the second point, all but *Jones* inclined that it was a trust, because that construction would be most beneficial for the legatees, and though the law did construe \* some words conditional in wills that would not be so in deeds, yet that was always with this difference, when that construction was most favourable to the legatees.

2 Show. 38, 41.  
Ante, C. 324.

But *Jones* doubted of that point, for he said that this Court would not take notice of the proceedings in a Court of Equity, and relied upon 1 Roll. 410. 1 Inst. 236. *Cur. advisare vult* (b).

(a) *Doe v. Fyldes*, Cowp. 833. *Doe v. Richards*, 3 Term Rep. 356. *Doe v. Snelling*, 5 East, 87. *Doe v. Clarke*, 2 New Rep. 343. *Roe v. Daw*, 3 Maul. & Selw. 518, and other cases cited in the note to *Hatton v. Read*, ante, p. 438. 2 Foul. Treat. of Eq. p. 53, notes, 5th edit.

(b) Judgment for the defendant, which was affirmed in the Exchequer Chamber. T. Jo. 114. The report of Pollexfen, p. 559, in favour of the plaintiff, seems to be erroneous. What words make a condition in a will, see Com. Dig. Condition,

A. 4. *Ibid.* Devise, N. 9, 10. 8 Viner, 336. Note, "A devisee may maintain an action at common law against the terre-tenant for a legacy devised out of land. I make no question of it, for where a statute, as the 32 & 34 Hen. 8, of wills, gives a man a right, he shall have an action to recover it of consequence." *Ewer v. Jones*, 2 Ld. Ray. 937. 2 Salk. 415. 6 Mod. 26. And see *Nicholson v. Sherman*, T. Ray. 24. *Per Twissden, J. Hawkes v. Saunders*, Cowp. 291. *Webb v. Jiggs*, 4 Maul. & Selw. 119.

## FORTESCUE v. ABBOTT.

( C. 658. )

Continued from p. 452.

B. HAVING three sons, devised his lands (a) to them all, and devised farther, that if either of his said children should depart this life, his lands should be equally divided amongst the survivors; B. dies, and then C. his eldest son died, leaving issue; and the question was, whether the surviving brothers of C. or his issue, should have the lands in question, which was that part that came to him by the devise?

B. devised lands to three sons, and if either of them died, that the lands of the deceased should be equally divided among the survivors: Held, that vested cross remainders were created by the devise. Held also, that lands should be intended of socage-tenure, unless the contrary appeared.

It was argued by *Saunders pro defendente*, that this is a contingent estate to the survivors, because it is not known who will be the survivors, and therefore it cannot be a remainder vested, because it is uncertain who shall survive to take it.

And admitting the remainder to be contingent, then it is in this case destroyed (b); for by the devise an estate for life only passed, which was immediately drowned as to the eldest son's part by the descent of the inheritance upon him; and by that means the contingent remainder is destroyed; for if a remainder doth not vest upon the determination of the particular estate, it shall never vest.

And he made another objection, that the lands are not found to be socage-tenure, and then they shall be intended to be held by knights-service, and so not deviseable for a third part, and cited Moor, 278.

*Pollexfen pro quer.* argued, that these are not contingent remainders, but remainders vested, it being in case of a devise, and then the merging of the particular estate will not destroy the remainder; and he cited 2 Cro. 695, 448, 416. Cro. Eliz. 161. 9 Co. 128. And for the case of *Wood and Ingersole*, 2 Cro. 260, the report is mistaken, for that was adjudged upon other reasons, as appears 1 Bulstrode, 61 (c); for there it was said his son surviving should be heir, and there being more than one, it was void for uncertainty.

Pollexf. 479.

\* *Per Cur'*:—These are cross remainders vested; for though they are contingent as to enjoyment, because it is uncertain who shall survive, yet they vest presently (d). [ \*482 ]

(a) Separate lands were devised to each son without words limiting any particular estate, and the devise was followed by these words: "When either of my children shall depart this life, then the houses, lands, goods, and whatsoever I have now given them, shall be equally divided betwixt them that are living." Pollexf. 479.

(b) As to this point see *Hartwell v. Keck*, ante, p. 405, and *Harrison v. Belcher*, post, p. 484.

(c) See the remarks in Pollexf. 481-2. R. T. Hardw. 16. 2 Saund. 386 a. notes.

(d) Levinz says that the court adjudged it to be a good executory devise "at *audiui*;" and see the *S. C.* quoted from Gilbert's MSS. in Gwillim's Bac. Ab. tit. Remainder, (G); but this seems to be a mistake. See Fearn's Cont. Rem. 243, 7th edit. Each child took a particular estate in his share for life, with a vested remainder to the others for their lives. Pollexf. 485. T. Jo. 80. A writ of error was brought, but afterwards discontinued. T. Jo. 80. All the cases on this subject are collected in Fearn, p. 240 to 247.

2. It shall be intended socage-tenure, though it be not found. 2 Roll. 697. *Jud. pro quer' (e)*.

(e) *Ante*, p. 452. *S. P.*, and Styl. 294. the military tenures, otherwise this question could not have arisen.  
T. Jo. 29. The will must have been made before 12 Car. 2, for abolishing

## DE TERM. S. MICH. 1680.

IN BANCO REGIS.

( C. 659. )

STAMFORD v. DAVIES.

Payment to the sheriff upon a *ca. sa.* is no discharge of defendant.

(1) *S. C. ante*, p. 453.

DEBT upon a judgment. The defendant pleaded that he was taken in execution by a *Ca. Sa.* upon that judgment, and had paid the money to the sheriff; and it was held to be no good plea, because though he do pay it to the sheriff, yet the sheriff may be insolvent, or may die and leave no assets, and then the party will be neyer the better; and so it was held lately in this Court in one *Baker's* case (1), who pleaded payment to the marshal, being in execution in the Marshalsea; and held to be no good plea. *Jud' pro quer' (a)*.

(a) See the references in note (a) to *Taylor v. Baker*, p. 453. *Porter v. Viner*, 1 Chit. Rep. 613.

( C. 660. )

TIZARD v. FINCH.

*Semb.* an information *qui tam* for not going to church may conclude *contra*

[ \* 483 ] *formam statuti*, though there be several statutes. Such information lies in the Courts at Westminster.

IN an information *Qui tam* for not going to church, two exceptions were taken.

1. He concludes *contra formam statuti*; and there are several statutes; so that it is uncertain which he meaneth.

To \* that it was answered, that the best should be taken for the king.

2. It was objected, that by the statute of 21 Jac. cap. 4, it ought to be brought before the justices in the county, &c.

But to that it was answered, that there being in the act of parliament, upon which this information is grounded, a clause, that no essoin, wager of law, or protection should lie, that must be intended of the Courts at Westminster; and so judgment was given *pro querente (a)*.

(a) See — v. *Carter*, *ante*, p. 64. in Burn's Eccles. Law, 3 vol. p. 232, tit. *Nicholls v. Cotterell*, p. 377. The information seems to have been brought upon Public Worship. 1 Hawk. P. C. c. 10. 23 Eliz. c. 1. See the different statutes Bac. Ab. Heresy, (D), 7.



**RESOLVED**, that a parol condition cannot be pleaded to bill (C. 660 b.) under seal (c).

(a) *Little v. Holland*, 3 Term Rep. 187, 194. And see 3 Lev. 234. 7 Taunt. 590. *Cordwint v. Hunt*, 8 Taunt. 596. 671.  
*Davey v. Prendergrass*, 5 Barn. & Ald.

**SEABORNE'S CASE.**

( C. 661. )

AN order of sessions, whereby he was adjudged the reputed father of a bastard child, was quashed, because it ought to have been made by the two next justices of the peace; and so by way of appeal to have come to the sessions; and it was said by Just. *Dolben*, that the opinion in *Prigeon's* case had been denied to be law (a).

The sessions have no power to make an original order in the case of bastardy. Cro. Car. 351. Style, 475.

(a) But see R. T. Hardw. 301. 1 Stra. 475. Dougl. 632. 1 Chetw. Burn's Just. 253. Com. Dig. Bastard, G. 2.

**WINCOMBE v. COLBORNE.**

( C. 662. )

IN an action for toll, a prescription was laid to have a quart *de quolibet sacco, angl'* a sack of corn, for toll; and moved in arrest of judgment, because a sack was a measure not known in law, and therefore it ought to have been explained, or otherwise it is uncertain.

The court will notice what measure is meant by a *sack* in a particular county.

But *Dolben* said a sack was a measure very well known in that county, and was there as certain as a bushel; and so he and *Jones* disallowed the exception, *cæteris absentibus* (a).

(a) 1 Roll. Ab. 525, 86. *Noble v. Ib.* 750. *St. Cross v. Ld. Howard De Durell*, 3 Term Rep. 271. *Hockin v. Walden*, 6 Term Rep. 338. *Cooke*, 4 Term Rep. 314. *R. v. Major*,

**HOLMES v. WILLETT.**

( C. 663. )

*S. C. Holmes v. Meynell*, T. Jo. 172. T. Ray. 452. 2 Show. 136. Skin. 17. Pollexf. 425.

A. DEVISETH lands to his two sons, and the heirs of their bodies; and if they die without issue, then the remainder to D. (a).

A. devised lands to his two sons, and the heirs of their bodies, and if they died

One of the sons died without issue, and the question was, whether his estate should go to the other son, or to him in remainder; or whether the remainder-man should take nothing till both the sons died without issue?

[ \* 484 ] without issue, remainder over: held, that cross remainders were created by implication.

And it was argued by *Pollexfen*, that here are cross remainders by implication, and he made a great difference where the devise was to two, *ut supra*, and where the devise was to three; for if a devise be to three, and the heirs of their bodies, and if they die without issue, the remainder

(a) The devise was of *all* his lands, and if the sons died without issue, then he devised *all the said lands* to the remainder-man. T. Ray. 453. See the statement in Raymond and Pollexfen.

to another person, there shall be no cross remainders by implication, by reason of the confusion and intricacy that it would make in the vesting of the estate, so that it would puzzle a good arithmetician to calculate the limitation of the estate; but in the case of two there is no difficulty, for there each of them would be seised respectively of his part in tail, with a remainder to the other in tail, with the remainder over. The authorities he cited *pro et con.* in this case were 2 Cro. 655. *Gilbert v. Witty*, 2 Roll. Rep. 281. 5 Co. *Windham's case*, Dy. 303, 330. Hob. 33.

Devises have often been adjudged void for uncertainty: As a man having several children deviseth to his issue; this is void for the uncertainty, by reason no man can tell what issue is intended. Cro. Eliz. 342. 2 And. 134. 1 Bulst. 61. 4 Leon. 14.

And he cited the opinion of the Lord. Ch. Just. *Hale* in the arguing of the case of *Hughes v. Robinson* (b), Hil. 15 Car. B. R. Rot. 666, where he put this case:—A feoffment is made to the use of A. and B. in tail, and if they both die without issue, the remainder to C., there shall be no cross remainders by implication; but he said otherwise it would be in the case of a will; and there, if it were in the case of a will, he took the aforesaid difference betwixt a devise to two and a devise to three. *Adjournatur* (c).

(b) The case cited by Pollexfen was probably *Cole v. Livingston*, 1 Vent. 224. See Pollexf. 433. 2 Show. 137.

(c) The judgment is given in the other reports, and was affirmed on error according to *Powell*, J. who said that "the case never went down with him," and that "he had heard learned people speak against it." *Tuckerman v. Jefferies*, Holt, 370-1, cited in 18 Viner, 430, pl. 9. However, the case is good law. It had been sent from Chancery for a trial at

the bar of the King's Bench. Pollexf. 434. Cross remainders may be implied between more than two, but the presumption is against the implication in such cases. See the cases collected upon this subject in the note to *Cook v. Gerrard*, 1 Saund. 185, to which add *Doe v. Webb*, 1 Taunt. 234. *Roe v. Clayton*, 6 East, 628. S. C. 1 Dow's Rep. 384. *Stephens v. Green*, 17 Ves. 78. *Cooper v. Jones*, 3 Barn. & Ald. 425.

( C. 664. )

HARRISON v. BELCHER.

S. C. T. Jo. 136. 2 Show. 91. 1 Vent. 345. T. Ray. 413. Pollexf. 573.

Lands are settled to the use of A. & B. for their lives, remainder to the first son of B. in tail, remainder to the right heirs of A. B. before issue releases to A.: *semb.* the contingent remainder is not

[ \* 485 ]  
destroyed.

A FEOFFMENT was made to the use of P. Barrett and Sarah Barrett for their lives, the remainder to the first son of Sarah Barrett in tail, the remainder to the right heirs of P. Barrett; Sarah, before issue, releaseth her estate to Paul Barrett, and then hath issue Samuel Hall the lessor of the plaintiff, and then died; the defendant was lessee of the heir of Paul Barrett. — The sole question was, whether or no this release of Sarah had so merged the particular estate, that there was nothing left to support the contingent remainder?

It \* was argued by *Saunders pro quer'*, that it had not; for that if one jointenant releaseth to another, this maketh no degree. 1 Inst. 184, 273. But it is all one as if Sarah

had died, and her estate had gone to Paul by survivorship before the birth of the first son; yet afterwards, when the first son is born, the estate will open and let in the estate, as it was held in *Lewis Bowles's* case; and it is no more than if the estate had been originally limited to Paul for life, remainder to the first son of Sarah, remainder to the right heirs of Paul; in that case, before the birth of the first son of Sarah, Paul had had a fee executed in him; and yet, when the first son had been born, the estate would have opened and have let in the estate of the first son. And he said, that a release of one jointenant for life to another hath the same effect to all intents and purposes as in case of death, except in relation to strangers that have charges and incumbrances; for they shall not be barred or defeated by one jointenant's releasing to another; but if after such release the releasee dieth, their estate is determined, though the releasor be living. But *quære*, whether it shall not have a continuance for the part of the releasor for the benefit of a stranger in case of incumbrances, as judgments, &c.

The release of one joint-tenant for life to another has the same effect as death, except in relation to strangers. *Per Saunders, argdo. Acc. 2 Show. 92. S. C.*

*Pollexfen* argued *e contra*. And he agreed, that if a feoffment were made to the use of Paul for life, remainder to the first son of Sarah, remainder to the right heirs of Paul, here notwithstanding that Paul had a fee executed in him, yet upon the birth of the first son, the estate would divide and let in the first son, and Paul would be but tenant for life.

But he took a difference, where it rested upon the original conveyance; there, though the estates did unite, yet they would open and let in the contingent remainder; but where a particular estate was limited with a contingent remainder over, &c. and afterwards by any other conveyance or act, the particular estate and the inheritance met together, so as to merge the particular estate, there the contingent remainder was destroyed; and so it was held in the case of *Fortescue* and *Abbott* (1), 6 Co. 15. *Trepot's* case, 1 Co. 77. 2 Co. 60, *Wiscott's* case. Litt. Sect. 182, 184. *Scroggs* and *Jones* inclined, that the contingent remainder was not destroyed. *Dolben e contra. Advisare volunt.*

(1) *S. C. ante*, p. 481, and *Hartnell v. Keck*, p. 405, and note *ibid*.

*Pollexfen* held, that if one jointenant had died, the contingent remainder had been destroyed (a).

(a) Judgment for the plaintiff. See the other reports (except Shower, who is mistaken in his report of the event), and *Lane v. Pannel*, 1 Rol. Rep. 238, 317, 438. 4 Leon. 237. That the alteration in a particular estate, which will destroy a contingent remainder, must be an alteration in its quantity and not merely in its quality, see Butl. Fearne Cont. Rem. 338-9.—N. B. Sir T. Raymond says, that judgment was given for the plaintiff

“by Scroggs, C. J., Jones, and myself.” p. 414. According to Shower, Pemberton was the fourth judge. In fact, Sir T. Raymond succeeded Sir F. Pemberton during the argument, and was at this time a puisne judge of the K. B.; see 2 Show. 94. *Chronica Juridicalia*, p. 207. Heywood's *Vindication of Fox*, Appendix, p. xvii.: and this explains the contradiction mentioned in *Steede v. Berrier*, *ante*, p. 478, note (a).

## (C. 664 b.)

Contract for sale of land by parol is void since the stat. of frauds, although there be a considerable part payment.

A CONTRACT for land by parol, and a great part of the money paid, is void since the statute of frauds and perjuries; but the party that paid the money, or his executors, may in equity recover back the money. As to this I saw Sir *W. Jones's* opinion under his hand (a).

(a) And this opinion seems to be law at the present day, although some cases have recognized a distinction between the payment of a large and of a small sum of money. See *Leake v. Morrice*, 2 Cha. Ca. 135. *Alsop v. Patten*, 1 Vernon, 472. *Seagood v. Meale*, Preced. Chan. 560. *Ld. Fingal v. Ross*, 2 Eq.

Ca. Ab. 46. *Lacon v. Mertins*, 3 Atk. 1, 4. *Main v. Melbourn*, 4 Ves. 720. *Butcher v. Butcher*, 9 Ves. 382. *Clinan v. Cooke*, 1 Scho. & Lef. 22. 14 Ves. 388. These and other cases are collected in Sugden's Vend. & Purch. 101-9, 5th ed. And note, the money may now be recovered back at law. Sugden, *ubi supra*.

## (C. 664 c.)

One of the witnesses to the publication of a will may subscribe it separately at another time.

A WILL made in writing, and one of the three witnesses, who saw it published, set his hand to it at another time; and held good. And so it had been adjudged, as Sir *Fra. Winnington* told me (a).

(a) Acc. Prec. Chan. 185. 2 Chan. 2 Ves. Senr. 458. 1 Ves. Junr. 14. 1 Ca. 109. *Jones v. Lake*, 2 Atk. 177 (n). Fonb. Treat. of Eq. 196, n.

## DE TERM. PASCHÆ, 1682.

IN BANCO REGIS.

## (C. 665.)

## SIR JOHN WILLIAMS'S CASE.

*S. C. Herring v. Brown*, 1 Vent. 368, 371. 2 Show. 185. Comb. 11. Carth. 22. Skin. 35, 52, 71, 187.

*Quære*, whether a power be well executed by a fine levied by the tenant for life, and a subsequent deed declaring the uses of the fine?

A SETTLEMENT was made by old Sir Jo. Williams to himself for life, with a power of revocation by any writing under his hand and seal, testified by two witnesses; and afterwards the said Sir Jo. Williams levies a fine, and by a deed subsequent declares the uses of the said fine. And the question was, whether this fine and deed were a good execution of the power?

[ \* 487 ] It was objected that it was not; for that by the fine the power was extinguished, according to the cases in the \* First Report; and by the rules of law a thing extinguished cannot be revived.

2. Sir John being only tenant for life, and levying a fine *sur conusance de droit come ceo*, it was a forfeiture of his estate.

On the other side it was argued, that the deed and fine are but one assurance, and so it is not material which is first executed; and it hath been adjudged in the case of ——— (a)

(a) See *Wigston v. Garret*, ante, p. 411-2.

that if the deed be executed before the fine, it is well enough; and a case cited adjudged in point in this Court *per Hale*, C. J. *Et adjournatur*. And so it is in case the deed of covenants be executed before the fine; and so allowed in Chancery in the argument of the Earl of *Bath's* case (b).

(A) The Court of K. B. adjudged the fine to be an extinguishment of the power; but the judgment was reversed in the Exchequer Chamber. Carth. 22. See *Tomlinson v. Dighton*, 1 P. Will. 168. *Hawkins v. Kemp*, 3 East, 428. *Doe v. Whitehead*, 2 Burr. 704. 16 Viner, 494. 5 Cruise's Dig. 215-6, 2d edit.

### PETTISON v. ELWAIES.

( C. 666. )

S. C. Skinner, 31, 36. 2 Show. 198.

A FEME jointress in tail, having issue by her husband two daughters, the said daughters levy a fine in order to sell the reversion, and after the mother makes a lease for sixty years (a). The question was, whether this lease was void within the statute of 11 H. 7; for if the lease be not to be avoided by that statute, it will be good against the issue in tail and the reversioner; for if tenant in tail make a lease for years, and the issue in tail levy a fine, this hath made good the lease of the tenant in tail. [*Post*, C. 677.]

*Semb.* a lease for years by a jointress in tail is not void by stat. 11 Hen. 7, c. 20. *Semb. aliter*, if created by fine.

But it was argued, that a lease for years is not within the meaning of the statute, unless it be by a fine *sur concessit*; because the issue in tail or the remainder-man may avoid that without the help of the statute, unless he doth any act to corroborate it; and it cannot be intended, that the statute intended to provide remedy where it was unnecessary; but where the estate made by tenant in tail was before that act a bar or discontinuance, there the statute provided a remedy; the authorities cited were 3 Ed. 4, 13, 14. Moor, 250. 2 Leon. 268. Dy. 213. 1 And. 6, 57. 3 Co. 90. 2 Cro. *Croker v. Kelsea* (1). Jones, S. C. Bridg. 27. Hutton — Bro. Fine, 121. Sav. Rep. 106.

(1) *Vid. Skin. 31.*

*Note.*—All the cases put, where a lease for years is adjudged within this statute, are where such lease is made by fine.

A rent created adjudged within this statute (b).

*Adjournatur* (c).

(a) Skinner states the case thus: "Baron and feme, tenants in special tail of the provision of the husband, have issue; the baron dies; the issue levies a fine to a stranger; the feme leases for sixty years and dies."

(b) Pollexfen thought that a rent granted by fine out of the lands would be avoided by the statute. 2 Show. 194. S. C.

(c) "Ordered, judgment for defendant *nisi*: In this case the court said that no lease, though for 500 years, created by a feme jointress by deed, is a forfeiture, because the heir might avoid it: *ut Trevor dixit, quod ego non memini*." Skin. 36. S. C. See *Cudmore v. Bettison*, 1 Sid. 62. Bac. Ab. Discontinuance, (D). 13 Viner, 255.

( C. 667. ) WEBBE v. BATCHILOR ET AL' (a).—*Trin. 26 Car. 2, Rot. 904.*

*S. C. ante, p. 396, 407, 457.*

*Trespass for taking Cows. The Defendants plead Not guilty.*

See margin,  
*ante, p. 396.*

POSTEA die et loco infra content. coram Johanne Vaughan Milit. Capital. Justic. Dom. Regis de Banco et Christophoro Turner Milit. uno Baron. Scaccarii dicti Dom. Regis Justic. ejusdem Dom. Regis ad assisas in com. South'ton capiend. assign. per formam stat', &c. ven. infra nominat. Edwardus Webbe Sacræ Theologiæ Professor per attorn. suum infra content. et infra script. Petrus Batchilor Thomas Hunt Jacob. Frowde Jacob. Knight Stephanus Bartholomew Richardus Winkeworth Petrus White et Johannes Wornham alias Wordinham licet solempnit. exact. non ven. sed default. fecerunt. Ideo jur. unde infra sit mentio capiat. versus eos per default. et juratores jurat. ill. exact. quidam eor. videlicet Johannes Wheeler Jonathan Mapleton Robertus May Thomas Paman Johannes Hole Will. Edes Johannes Blundell ven. et in jur. ill. jurat. existunt et quia resid. jur. ejusdem jur. non comparuer. Ideo alii de circumstantibus per vic. Com. prædict. ad hoc electi ad requisitionem prædict. Edwardi Webbe ac per mandat. justic. præd. de novo apponuntur quor. nomina panello infra script. affilantur secundum formam stat. in hujusmodi casu nuper edit. et provis. Ac jur. sic de novo apposit. videlicet Ambrosius Forde Philip. Lyne Thom. Austyn Thom. Cropp et Johannes Gibbes exact. similiter ven. qui ad veritat. de infra content. simul cum al. jur. prædict. prius ad hoc impanellat. et jurat. dicend. electi triati et jurati dicunt super sacr'um suum quod prædictus Edwardus Webbe fuisset per spatium septem annorum ult. præterit. et nunc existit clericus in sacris ordinibus et persona impersonat. Ecclesiæ parochialis de King's-cleere in Com. South'ton præd. et per tot. illud tempus servavit protelum anglice a *Team* equorum infra dictam parochiam de King's-cleere quodque ipse fuisset in anno Regni dicti Domini Regis nunc vicesimo quinto per tunc supervisors viar. anglice *surveyors of the highways* prædictæ parochiæ de Kings-cleere debito modo appunctuat. et summonit. in Ecclesia parochial. præd. sex separal. diebus et temporibus ad mittend. protelum suum prædictum ad laborand. pro reparatione altar. viar. tunc in decasu infra prædictam parochiam quodque ipse prædictus Edwardus Webbe habuit debitam notitiam et non misit protelum suum prædictum diebus prædictis vel super aliquem eorum de quibus sic notitiam habuit quod querela

[ \* 489 ] \*mentum inde postea debite fact. tribus proximis justiciariis pacis pro Com. prædicto justic. prædictum fecerunt warrant. suum sub manibus et sigillis eor. direct. prædictis Petro

(a) The report of this case seems to be misplaced. See *S. C. ante, p. 396*, and the notes there.



Batchilor Thomas Hunt Jacobo Frowde Jacobo Knight Stephano Bartholomew Richardo Winkeworth Petro White et Johanni Wornham alias Wordinham tunc constabular. et supervisor. anglice *surveyors of the highways* in eadem parochia de Kings-cleere ad levand. super prædictum Edwardum Webbe per districtionem summæ trium librarum pro eisdem sex separal. default. videlicet decem solid. pro qualibet default. et juratores prædicti ulterius super sacrum suum prædictum dicunt quod prædictus Edwardus Webbe nullum habuit notitiam prædict. querel.

fact. coram justic. prædictis nec summonitus fuit apparere coram justic. prædictis vel aliquo alio justic. pacis Com. prædict. nec apparuit coram eis ad faciend. excusationem suam vel ad ostendend. causam quare talem default. fec'. Sed quod warrantum prædictum fact. fuit ante aliquam talem notitiam vel summon. fact. vel deliberat. et quod prædictus Petrus Batchilor Thom. Hunt Jacob. Frowde Jacob. Knight Stephanus Bartholomew Richardus Winkeworth Petrus White et Johannes Wornham alias Wordinham per virtut. vel color. warranti prædict. prout lex postulat ceperunt duas vaccas in narratione infra script. mentionat. et vendiderunt easdem duas vaccas pro quatuor libris et decem solid. et levaverunt præd. tres libras et obtuler. triginta solid. resid. præd. quatuor libr. decem solid. custag. suis deductis eidem Edwardo Webbe quos præd. Edwardus Webbe accipere recusavit sed utrum super tota materia per juratores præd. in forma prædict. compert. videbitur Cur. et justic. dicti Dom. Regis hic, &c. quod prædicti Petrus Batchilor Thomas Hunt Jacob. Knight Jacob. Frowde Stephan. Bartholomew Richard. Winkeworth Petrus White et Johannes Wornham alias Wordinham sunt culpabiles de transgr. in narratione infra script. interius specificat. modo et forma prout prædictus Edwardus Webbe interius inde versus eos querit. juratores præd. penitus ignorant et inde petunt advisament. Cur. et justic. hic, &c. et si super tota materia prædicta per juratores prædictos in forma prædicta compert. videbitur Cur. et justic. hic, &c. quod prædict. Petrus Batchilor Thom. Hunt Jacob. Frowde Jacob. Knight Stephanus Bartholomew Richardus Winkeworth Petrus White Johannes Wornham alias Wordinham sunt culpabiles de transgr. prædict. in narratione prædicta interius specificat. modo et forma prout prædictus Edwardus Webbe interius inde versus eos querit tunc juratores prædicti dicunt super sacrum suum quod prædict. Petrus Batchilor Thomas Hunt Jacob. Frowde Jacob. Knight Richardus Winkeworth Petrus White et Johannes Wornham alias Wordinham sunt culpabiles de transgr. prædict. modo et forma prout prædictus Edwardus Webbe \*interius inde versus eos narravit [ \*490 ] et assidunt dampna ipsius Edwardi Webbe occasione inde ultia missas et custag. sua per ipsum circa sectam suam in hac parte apposit. ad quatuor libras et quindecim solidos et pecunia. et custag. illa ad quadragint. solid. sed si super tota

materia prædicta per juratores prædictos in forma prædicta compert. videbitur Cur. et justic. hic, &c. quod prædict. Petrus Batchilor Thom. Hunt Jacob. Frowde Jacob. Knight Stephan. Bartholomew Richard. Winkeworth Petrus White et Johannes Wornham alias Wordinham non sunt culpab. de transgr. præd. in narratione præd. interius specificat. tunc juratores prædict. dicunt super sacr'um suum prædictum quod prædicti Petrus Batchilor Thomas Hunt Jacob. Frowde Jacob. Knight Stephanus Bartholomew Richardus Winkeworth Petrus White et Johannes Wornham alias Wordinham non sunt culpabiles de transgr. prædict. prout prædicti Petrus Batchilor Thomas Hunt Jacob. Frowde Jacob. Knight Stephanus Bartholomew Richardus Winkeworth Petrus White et Johannes Wornham alias Wordinham interius inde placitando allegaver'. Et quia, &c.

Adjudged against the plaintiff Trin. 27 Car. 2. B. R.

The question is, whether he having no notice before the warrant issued, and distress made, the officer be a trespasser?

*Pollexfen* for the plaintiff cited the statute for the repair of the highways, 2 & 3 Phil. & Mar. cap. 8. 18 Eliz. cap. 10. 22 Car. 2, cap. 12, to levy by distress upon default, proved by oath made by them, having not a reasonable excuse; all these last statutes relate to charge only those persons that are liable by the first statute of Phil. & Mar. for highways; so whether, upon penning this statute of P. & M. that every parishioner keeping plough or plough land do his duty, a parson be bound thereunto? By the common law a parson is not to pay toll; by Magna Charta he is excused from several services. But secondly, the justices of peace ought to have summoned him before the warrant and distress, because he might have a reasonable excuse; and although they have a jurisdiction of the highways, yet their warrant before summons is void, and the officers are trespassers, because the party for this wrong is without other remedy either by writ of error or action; therefore the ministerial officers are excusable in executing their warrant. Bro. Tit. Judgment. 14 H. 8, 16. Cro. Car. 395. There the churchwardens of Hatfield were not churchwardens of Tattbridge, where they executed the warrant. Ch. J. *Hale* said: If he keeps a plough, though he hath no plough land, yet he is liable; and you might have gone\* to the justice, though after the distress, before it was sold, if you had any excuse; and we will the rather intend that you had no reasonable excuse, for that you have not shewn any yet; for take notice, we know nothing of privileges for the clergy to be discharged from repairing the highways; and we will not allow the dispute of so long a settled point; for in Sir Nicholas Hide's time it was resolved the clergy are liable thereto: all the question is, whether the justice not summoning him makes all void; and for that you ought to have sued the justices, and not the officers, whom the justices would have indicted

*Ante*, p. 396,  
n. (a).

if they had not obeyed and executed their warrant; though antiently justices of peace did not grant a warrant but upon an indictment; now 'tis taken otherwise upon complaint upon oath (1). *Twisden* said, he that keeps a coach, team or plough is chargeable within the act to the repair of the highways (2), which being within the jurisdiction of the justices, their warrant is but erroneous, and the officer in executing thereof is excusable. And so against the plaintiff it was adjudged *per Curiam, de termino Trin. 27 Car. 2.*

(1) *Ante*, p. 407.(2) *Ante*, p. 420, C. 557.

*Note*; A writ of error was brought upon this judgment, depending which, Mich. 27 Car. 2, an *audita querela* was brought to avoid execution of this judgment; and surmised, that after the judgment Stephen Bartholomew one of the defendants had released to Dr. Webbe all executions and demands; which being allowed by the Court, the defendants appeared thereto. *Nota*; I conceive the case, cited by Ch. Just. *Hale* to be resolved in Sir Nic. Hide's time, was Dr. *Davenant's*, parson of Palshut near Devizes in Wiltshire, who gave 4*l.* *per ann.* to repair the way to Devizes; and yet the surveyors charged him to do his duty for the repair of the highways; whereupon he insisted on his privilege as a clergyman; which the justices of peace referred to the judges of the assizes. Sir Nic. Hide afterwards, upon conference with the other judges, resolved he was liable; but Dr. Davenant, upon complaint thereof, was discharged at the Council-board; which case Dr. Webbe hath often told me, and that thereupon he was resolved to stand it out, as he did.

#### SIR THOMAS BEAMOUNT'S CASE.—In C. B.

(C. 667b.)

IN the summer assizes at Leicester, 29 Car. 2. Mr. *Thomas Powis* moved *Hugh Windham*, Judge of assize, that there being a dispute, if Sir Thomas Beamount's lands were in the parish of Belton or not; but the justice of peace refused to make out any warrant against him to determine the same; when it was proposed, that Sir Thomas should by rule confess a warrant from the justices of peace, and a distress by virtue thereof, and thereupon bring an action against the officers, and therein to stand only, that the lands are not within the parish, thereby to try the same. But it was objected by *Wingfield*, that the officers will plead not guilty, and thereupon will be excused by virtue of their warrant from the justices of peace. Whereto *Windham* said, they had lately otherwise resolved upon a special verdict in C. B. that an action in such case lies against the officer, and not against the justice of peace; and Mr *Powis* told me, the reason given by the Court was, because the justice of peace makes his warrant upon the information of the officers, and is otherwise a stranger thereto; but the officers are obliged to know the bounds of their own parish, and they must at their peril see their information be true; which perhaps may.

When a justice of the peace issues a warrant

[ \* 492 ]  
on the information of an officer, the officer only is liable to an action, if the information be untrue. 2 Term Rep. 225. Holt's N. P. 478, 484. 8 East, 113.

(1) *S. C. ante*,  
p. 396, 488.

difference this case from *Batchelor* and *Webb's case* (1), much insisted on in C. B. by *George Strode*, Serjeant, who in both cases argued for the officers, as Sir *Robert Shafto*, Serj. told me in the long vacation 29 Car. 2; and I was in C. B. when this rule of assizes was moved to be made a rule of Court, and accordingly was so made Mich. 29 Car. 2.

( C. 668. ) THE ABSTRACT OF THE LORD CHIEF JUSTICE HERBERT'S  
ARGUMENT UPON SIR ED. HALE'S CASE.

*S. C. Godden v. Hales*, 11 Howell's State Tri. 1166. Comberb. 21. 2 Show. 475.  
4 Bac. Ab. p. 178, 5th edit. Clift. Ent. 133.

On the dispens-  
ing power.

THIS case is of great consequence, and so are all cases that concern the king's prerogative; but of a case that hath raised so much expectation it is of the least difficulty of any.

Where there is a legislative power, that power can dispense with any laws of its own making; God Almighty can dispense with his own laws, but things that are prohibited by the law of God or nature cannot be dispensed with by any human power whatsoever.

[ \* 493 ]

But for human laws there is a kind of necessity that they should be changed and varied according to the circumstances of men or times; for no law can be so contrived but either it may be too large, and take in persons who ought not to be taken in, or it may be too narrow, and \*leave out persons that ought to be taken in, and therefore it is necessary, that they should be subject to alteration by the same power that made them; but the laws of God are so adapted to all the circumstances of men and times, that there needs no alteration in them.

There are some cases wherein the king cannot dispense.

*Ante*, p. 138.

1. *Mala in se*, such things which by the law of God or nature are evil antecedently to any human law.

*Ante*, p. 137.

Nay, the king cannot dispense with a law made for the punishment of any such offence; as a rape is felony by the law; the king's dispensation will not make it none; and that answers the cases of simony.

*Ante*, p. 138.

2. Where the subject hath a particular interest or damage; and therefore the king cannot dispense with a nuisance and the statute of usury.

3. Where there is a precedent disability; and therefore where a man buys any office within the statute of Ed. 6, the king's dispensation will not avail him, because by the contract a disability is created in him; but if he got the dispensation before, and contract afterwards, *semble a buy q' est bone*.

And he knew no case, that did not come under one of these heads, but that the king could dispense with it.

*Ante*, p. 138.

To say the king cannot dispense with a law that is made *pro bono publico*, is to say, that he can dispense with no law at all; for all laws are supposed to be *pro bono publico*, when they are first made.

To say that the dispensing with the law may be of dangerous consequence, is no argument at all, for that may be said of the exercise of the king's prerogative in many cases, supposing that he would abuse the exercise of it; none will deny but that the king hath power to proclaim war when he pleaseth, and yet it may be said that he may keep us always in war, and so ruin his subjects. 11 State Tri. 1260.

No man doubts but that the king may enhance or debase the coin; and yet it may be said, that this may be so done as to destroy all commerce and merchandise.

The king may pardon felons or murderers; and yet it may be said, if he should pardon all, it would in time turn the nation into savageness and barbarity, that it would be as good living amongst cannibals, &c. as here; but we are not to suppose that any thing of this kind will be done, but that the king will use his power and prerogative for the benefit and protection of his subjects, and not to their damage (a).

(a) See the authorities on the dispensing power cited in Hargrave's notes to Co. Lit. 120 a. n. 3 and 4; and in the notes upon the principal case, in the State Trials. *Thomas v. Sorrel*, ante, p. 85, 115, 128, 137. 2 Hawk. P. C. ch. 37, § 28-32. Finch Law, 234-5. *Arris v. Stukely*, 2 Mod. 260. Reg. Placitandi, 192. 2 Hurd's Dial. p. 288, &c., 6th edit. Dialogue VI. Stillingfleet's Ecclesiastical Cases, 2 Pt. p.

126, &c. ed. 1704. Tyrrell's Bibliotheca, p. 589, &c. Burnet's O. T. sub. ann. 1686. The same subject was much discussed in the debate upon the embargo on the exportation of corn in 1766; see 16 Hansard's Parliam. Hist. p. 245, et seq. where will be found a speech commonly (but it seems erroneously) attributed to Lord Mansfield. And see Preface to Hargrave's Law Tracts, p. xxx—xxxiv.

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*Semb. S. C. Titus v. Perkins*, 3 Lev. 255. Carth. 12. 3 Mod. 132. Comberb. 43. (C. 669.) Skin. 247. 2 Show. 507. Lilly Ent. 371.

UPON a writ of error the question was, whether a custom for a copyholder upon his admittance to pay a year's value of the land, as it is at the time of the admittance, were a good custom? And it being ruled in the Common Pleas, that it was a good custom, it was argued here by *Pollexfen*, that it was not, for the incertainty of it; for every custom ought to be certain; and he cited Cro. Eliz. 377. 4 Co. 27. Cro. Car. 197. Argued by *Finch*, that it was a good custom, and certain enough; *quia id certum est quod certum reddi potest*; and he relied upon the case 1 Rol. Rep. 48. Noy, 2. A custom to pay what fine the homage should set, ruled to be good, which is more uncertain than this; and so held in a case 6 Jac. Hil. Term. in B. Rot. 1613; and it is cited in the Lord Chief Justice *Hale's* manuscript in Lincoln's Inn library. The Judges inclined that it was a good custom. A custom for a copyholder to pay on admittance a year's value of the land, as it is at the time of admittance, is a good custom (a).  
A custom to pay what fine the homage shall set, is good. Watk. Copyh. 475-6, 2d edit.

(a) *Grant v. Astle*, 2 Dougl. 731, n. *Halton v. Hassel*, 2 Stra. 1042. Com. Dig. Copyh. H. 3, 4. 6 Viner, 107.



## DE TERM. S. MICH. 1689.

IN BANCO REGIS.

( C. 670. ) KING v. DILLINGTON.—*Hil. 2 & 3 Jac. 2. Rot. 494.*S. C. 1 Salk. 386. Carth. 41. Comb. 118. 1 Lutw. 765. 3 Mod. 221. Holt, 158.  
1 Show. 31, 83.

A custom in a manor, that if the heir come not in to be admitted after

[ \* 495 ] three proclamations at three courts, the copyhold shall be seized as forfeited absolutely, is good (a). But such custom shall not bind the heir within age. *Holt, C. J. dissent. (b).*

*Quære*, if a custom, expressly binding the infant, would be good?

If the infant delay to be admitted, the fine may be increased accordingly.

1 Leon. 100.  
3 Leon. 221.  
Cro. Jac. 226.  
Cro. Eliz. 879.

4 Co. 22.  
Until admittance the estate is in the surren-

WRIT of error to reverse a judgment in the Common Pleas. *Judgment done per Holt, Dolben, Gregory and Eyres.*

The case upon a special verdict was: tenant for life, [and] remainder[-man] in fee of a copyhold join in a surrender to the \* use of John Freeman and his heirs. John Freeman dies before the surrender was presented, his heir being an infant.

The surrender was presented at the next court, and three proclamations made at the three ensuing courts according to the custom of the manor; and the custom of the manor was found to be, that if the heir (c) did not come in to be admitted upon three proclamations made as aforesaid, the estate was forfeited.

The lord entered for the forfeiture.

And the question was, whether an infant was bound by this custom so as to forfeit his estate; and if it were a forfeiture, whether it was an absolute forfeiture, or defeasible upon the infant's coming to be admitted and paying his fine?

*Dolben, Gregory and Eyres* held, that it was no forfeiture in the case of an infant. And *Dolben* held, that if a special custom had been found, that it should have been a forfeiture in case of an infant, it had been a void custom (d); and cited many cases, where although laws and customs were general, yet infants were not bound; as in case of a fine and non-claim, where infants are not excepted before the last statute, an infant is not within the law to be bound by it.

*Holt è contra*, That it should be a forfeiture, but not absolute, but until the infant came to be admitted and paid his fine, and that the lord had a good right to enter in the mean time. And they all agreed, that until admittance the estate is clearly in the surrenderor, and that the surrenderee hath no manner of right either to take the profits, or bring an

(a) *Earl of Salisbury's case*, 1 Lev. 63. *Stowel v. Zouch*, Plowd. 372. *Doe v. Hellier*, 3 Term Rep. 162. Com. Dig. Copyh. G. 2. *North v. Earl of Strafford*, 3 P. Will. 151. Watk. Copyh. p. 353-8, 2d edit. Gilb. Ten. 230-1.

(b) See now the stat. 9 Geo. 1, ch. 29, § 5. *Kensington v. Mansell*, 13 Ves. 240.

(c) The custom, as stated in the other reports, is, that if on a surrender pre-

sented and three proclamations made at the three ensuing courts, the surrenderee come not in to be admitted, the lord may seize as forfeited. As to this custom, see *Noy*, 42. Cro. El. 879. 2 Vernon, 367. Watk. Copyh. 358, 2d edit.

(d) But *Eyres, J.* differed from *Dolben* on this point. See S. C. 1 Salk. 386. 1 Show. 83, and the statute and case cited in note (b), *supra*.



ejectment, until admittance; so that, as *Holt* insisted, the infant is not concerned in the profits, it is only the surrenderor; and it was his folly that he would surrender to one that would not come to be admitted.

If this were not so, the lord would be at a loss for his fine, and without remedy; and although, as it was held by all, if an infant will stand out three or four years before he comes to be admitted, that the lord may increase his fine accordingly (e), if the infant should die before he is admitted, the lord cannot increase it upon him that comes next.

*Dolben* said, he kept twenty-six courts for several years, and the custom of all was, to forfeit for not coming in to be admitted upon proclamations; but if an infant was in the case, the entry always was *nulla proclamatio quia infans*.

\* In this case it was said, that when a fine certain is to be paid upon admittance to a copyhold, there the copyholder ought to bring it with him when he comes to be admitted; but if it be uncertain, there the lord is to set it, and appoint a time and place for payment of it (f).

And it was agreed by all of them, that by the customs of some manors, a fine of four or five years value might be reasonably set; as in the manor of Harrow on the Hill and Croydon, where the custom is for a stranger to pay a fine upon his admittance to a copyhold; but if once a tenant, he pays a fine no more: and *Dolben* cited a case of *Pinsent* the prothonotary, who was a rich man, and purchased a house in Croydon, and five years value was set for a fine; and the matter was disputed and came to a trial; and it was held to be a reasonable fine; and that in such a case he might have set seven years value (g).

But in the principal case, the other three Judges being of opinion that the infant was not bound by the custom, the Lord Chief Justice consented, that the judgment given in the Common Pleas should be affirmed.

(e) See *S. C.* 1 Show. 86. 3 Mod. 225.

(g) *Kitch.* 103 b. 1 Watk. Copyh.

(f) 6 Viner, 109. 4 Co. 27 b, 28 a. 476-7, 2d edit.

*Cro. Eliz.* 779. *Moor.* 622-3. *Gilb. Ten.* 219.

deror. 1 Mod. 120. 2 Wilson, 402. 5 East, 132. 1 Barn. & Cress. 578.

1 Show. 86.

[ \*496 ]

If the fine be certain, it must be tendered on admittance: if uncertain, the lord must set it, and fix a time and place for payment.

Five years value is a reasonable fine on admittance, where nothing is payable except on the first purchase.

### YOUNG v. PEIRCE.

( C. 671. )

UPON an appeal to the Delegates, the case was, that Henry Peirce died intestate, leaving issue Jo. Peirce and Anne Peirce; his personal estate being valued at about 3500*l.* Anne Peirce agreed to take 1500*l.* for her share; and thereupon agreed, that Jo. Peirce should take administration, and released her right to the personal estate. Jo. Peirce paid the 1500*l.* and dies, and makes Young his executor, and devises to him all his personal estate, there being 1000*l.* out upon bond of Henry Peirce's estate. The question was, whether Young the executor of the son, or Anne the daugh-

A. died intestate, leaving issue B. & C.: C. for a valuable consideration released all right to the personal estate: B. died, making D. his executor and legatee of all his personalty: held, that D.

was entitled to administration of A.'s effects in preference to C.

ter, who was since married to Mr. Webbe, should have administration? And Dr. *Raynes*, the Judge in the Prerogative Court, gave it to Young; whereupon Mr. Webbe and his wife appealed; and the Delegates of the common law were *Powell, Gregory and Turton*; and the civilians were *Littleton and Newton, &c.*

(1) *Semb. S. C.*  
[ \* 497 ]  
*Isted v. Stanley,*  
*Dyer, 372, a.*

And they affirmed the sentence in the Prerogative Court; because they said, that Young, as executor of Jo. Peirce, was in equity intitled to all benefit of the personal estate of H. P. by reason of the agreement; and it was like *Isted's* case (1), of an executor dying intestate that was a residuary legatee, administration shall be committed to him (a); and one *Henson's* case was cited, where a will is made, and no executor appointed, administration shall be committed to the residuary legatee.

The reporter's observations on this decision.

But it seemeth to me, that the law is contrary; because the administrator, as he is now invested with interest and power, was first created by stat. 31 Ed. 3; for before that statute an administrator was but the ordinary's servant; for neither the ordinary nor administrator could sue for a debt, or release a debt, or dispose of or alien any of the intestate's estate; and by that statute, and the statute of 21 H. 8, 5, administration of an intestate's estate is to be committed to the next of kin.

And the books of law say, that the ordinary must strictly pursue his power, and that it is not at all left to his discretion. 9 Co. *Hensloe's* case. Cro. Car. 106. Jones, 175.

And although several contests have been concerning administration, yet there was never any appears but where there was a pretence of an equality, if not a proximity of kin; as in these cases following questions have been made; as,

1. Whether a father or mother were of kin? which is now settled; as appears by Bro. Administrat. 47. 3 Co. *Ratcliff's* case.

2. Whether the half blood?

3. Whether the wife? that is settled by the express words of 21 H. 8, 5.

4. After that, whether the husband? that was settled in the case of *Jones and Roe*, Cro. Car. 106. Jones, 175: so curious have the Judges always been in construing and pursuing that statute.

It is said in the books, amongst other things, that by these acts the person is now determined, and the Judges ought strictly to pursue the statutes, and that it is not at all left to discretion. 9 Co. 38. *Hensloe's* case, Jones, 175.

(a) The case referred to seems to be that cited in the margin of Dyer, where an executor, who was also residuary legatee, died intestate before probate; and his administrator obtained adminis-

tration *de bonis non* of the original testator, in preference to the next of kin. S. C. recognized Com. Dig. Administrator, B. 6.

And as to the release it was insisted, that could not operate upon a future right; and cited Co. Litt. 365, a. b. 10 Mod. 63. Hob. 45.

But yet the sentence was affirmed (b).

(b) See *Cartright's case*, ante, p. 258, 87, pl. 23. Godolph. Orph. Leg. 280. and references *ibid.* and *Farrington v. Knightley*, Prec. Chan. 567. 11 Viner, 87, pl. 23. Godolph. Orph. Leg. 280. Style Prac. Reg. 69, 4th edit.

## DE TERM. S. HIL. 1690.

[ 498 ]

IN BANCO REGIS.

## ROUND v. RIC. KELLO.

(C. 672.)

*S. C. Kellow v. Roundsh*, 3 Lev. 286. 3 Mod. 253. 1 Show. 244. Carth. 126. 3 Salk. 178. Holt, 71, 336.

DEBT upon an obligation, wherein the plaintiff declares, that Jo. Kello became bound to him, and bound himself and his heirs, and died seised, and that the defendant Ri. Kello was his son and heir.

The defendant pleaded *riens per descent*. A special verdict was found, that Jo. K. the grandfather of the obligor was seised in fee (a), and settled his estate to the use of himself for life, remainder to John his son, and the heirs of his body, remainder to his own right heirs, and then died; and that John the son entered and died; and then John the grandson entered and died without issue; and then the estate came to the defendant Richard. And the only question was, whether the plaintiff ought not to have derived the defendant's title to the estate by John the father and John the son, they being both seised?

*Eyre*: That he ought to have derived by both the Johns, they being seised of the fee in reversion, as well as the estate-tail in possession; and it was in their power to have aliened the reversion in fee, and they might have joined the issue in a writ of right, and so to all intents were seised thereof.

But *Gregory, Dolben* and *Holt à contra*. They all agreed, that in case the estate-tail had not been in the case, the plaintiff must have mentioned them; but John the son, and John the grandson being tenants in tail, though they had the reversion in fee, yet this was not such seisin of the fee as the plaintiff need take any notice of; because it was no assets in their hands; for a reversion upon an estate-tail is no assets, because by possibility it may continue for ever; and the tenant in tail may bar the reversion by a recovery.

A reversion in fee expectant on an estate-tail, in which it vests in possession, assets for payment of a bond debt of the ancestor last actually seised in fee in possession. In declaring against the heir on such a bond, he may be named immediate heir to the obligor, without mentioning the intermediate descents of the reversion. *Eyre, J. dissent.* Cro. Car. 151, 410. 2 Rol. 709, pl. 62. *Ante*, p. 160.

Reversion upon estate-tail is no assets.

(a) This is a mistake.—The grandfather was himself the obligor. See the report of Levinz who was of counsel in the case.

1 Rol. 628.  
Harg. Co. Lit.  
14 b. n. (3).

And *Dolben* said, that the 1 Inst. 14, was just as to the point in this case, and stronger; for there it is said, that the seisin of a brother of the half blood of a reversion upon an estate for life is not such a seisin as shall bar the brother of the half blood, and give the estate to the sister: and the case of *Edwards* and *Rogers* was cited on both sides. Cro. Car. 525, and Jones, 456.

*Jud. pro quer' (b).*

(b) Co. Lit. 11 b. 15 a. *Gifford v. Tweedale v. Earl of Coventry*, 1 Bro. Barber, 4 Viner, 452. *Cunningham v. C. C. 240. Ibid. 260. Doe v. Hutton*, Moody, 1 Ves. Sen. 174. *Kinaston v. 3 Bos. & Pull. 643; and see note (4) by* Clark, 2 Atk. 204. *S. C. plenius in 2 Serjeant Williams to Jeffreson v. Morton*, Cruise Dig. 447, 2d edit. *Smith v. Parker*, 2 W. Black. 1230. *Marchioness of*

( C. 673. )

BOSON v. SANDFORD ET AL'.

S. C. 2 Salk. 440. 3 Salk. 203. 3 Lev. 258. Carth. 58. Skin. 278. Comb. 116. 1 Show. 29, 101. 2 Show. 478. 3 Mod. 321.

An action for the miscarriage of goods by water may be brought against the ship-owners, or the master.

It will lie *ex contractu* without alleging the custom of England. C.T. Hard. 199. Harg. Co. Lit. 89 a. n. (7). It must be brought against all the owners, and a non-joinder may be shewn under the general issue.

*Dolben, J. dissent.* 4 Mod. 181. There is no difference in law between a land-carrier and water-carrier.

THE defendant was one of three part-owners of a ship, and the plaintiff delivered goods to the master of the ship to be carried from London to ——— which being damaged in the carriage, the plaintiff brought an action of the case against the defendant; and upon a special verdict, the case appeared to be *ut supra*. The Court gave their opinions *seriatim*.

1. They all held that the action was well brought against the owners, though there was no express contract with them, because the master is but in the nature of a servant to the owners, and they ought to answer for him; and they said the plaintiff hath his election, either to charge the owners upon the implied contract, or the master upon the express agreement when the goods were delivered to him (a).

And they all said they knew no difference in point of law between a land-carrier and a water-carrier (b), but that an action would lie as well against one as the other. And although it be the common course to declare against a carrier, by alleging the custom of England to charge him; yet it would be a good declaration, if it were laid in consideration that the party was to pay him as much as it was worth, that he did agree to deliver.

[ \* 500 ] 2. They all held, that the action ought to have been brought against all the owners; but *Dolben* said the defendant ought to have taken advantage of it by a plea in a\*bate-ment, and having omitted that opportunity, that he should now have no advantage of it.

But the other three Judges held, that the defendant might take advantage of it upon the general issue; for if three jointly make a promise, and an action is brought against one,

(a) *Ante*, p. 440, S. P. 15 Viner, 348. 10 East, 530. 3 Brod. & Bing. 171. and *Boucher v. Lawson*, C.T. Hardw. 85, 194.

(b) 2 Lev. 69. Cro. Jac. 330. Hob. 18. 2 Ld. Raym. 918.

he may plead *non assumpsit*, and give the special matter in evidence.

And *Holt* said it could not be pleaded in abatement, because the declaration is *super se susceperunt* to deliver the goods, and the plaintiff might give an express agreement in evidence; and therefore it could be no good plea in abatement to say there are other owners not named, because they are not charged as owners, but either by reason of the trust or the consideration.

*Jud' pro def' (c).*

(c) It is not clear whether the action was considered to be in form *ex contractu* or *delicto*: the declaration contains the words *super se susceperunt* and the plea is *not guilty*. *Carth.* 59. And see 3 Lev. 258-9. 5 Term Rep. 651. 6 Id. 373. 3 East, 68. 1 Wilson, 282. 2 New Rep. 367-9. That this plea does not preclude the supposition of its having been treated as an action of *assumpsit*, see *Marshall v. Gibbs*, 2 Stran. 1022. *Aaron v. Chaundy*, 2 Barn. & Cress. 562. But admitting it to have been an action *ex contractu*, the opinion of *Dolben* is now established law, and the former practice was overturned by the case of *Rice v. Shute*, 5 Burr. 2611. S. C. 2 W. Black. 695, followed by *Abbot v. Smith*, 2 W. Black. 947, which determined that the non-joinder of other contractors not only might be pleaded in abatement, but must be so pleaded in order to take advantage of that objection. 3 East, 68-9. The decision in *Rice v. Shute*, is said to have "caused great surprise in Westminster Hall," 2 New Rep. 373. See the note on this subject in *Cabell v. Vaughan*, 1 Saund. 291 b, &c. There is a doubt

whether a plea in abatement for non-joinder of other owners be available, when the declaration is framed in *tort*: See *Mitchell v. Tarbutt*, 5 Term Rep. 649. *Buddle v. Wilson*, 6 Ibid. 369. *Powell v. Layton*, 2 New Rep. 365. *Max v. Roberts*, Ibid. 454. S. C. 12 East, 89. *Weall v. King*, 12 East, 452. *Govett v. Radnidge*, 3 East, 62. *Bretherton v. Wood*, 3 Brod. & Bing. 54. The following cases also are not irrelevant: *Samuel v. Judin*, 6 East, 333. *Green v. Greenbank*, 2 Marshall, 485. *Lopes v. De Tastet*, 1 Brod. & Bing. 538. *Cooper v. South*, 4 Taunt. 802. *Dickon v. Clifton*, 2 Wils. 319. At all events, where the obligation of the defendant, as a public carrier, appears in the declaration, and the breach of duty complained of is not a mere nonfeasance, such a plea to an action upon the Case is bad; *Ansell v. Waterhouse*, 2 Chitty's Rep. 1, in which Bayley, J. is reported to have said, that "*Govett v. Radnidge* would be the case to follow, if necessary to decide between conflicting cases." p. 4.

## DE TERM. S. MICH. 1691.

IN BANCO REGIS.

GERMAN and ORCHARD.

(C. 674.)

S. C. 1 Salk. 346. 3 Salk. 222. Holt, 331. 12 Mod. 11. Skin. 528. Show. Parl. C. 199.

A TERMOR for years, reciting his lease, grants the land, and the said recited lease, and all deeds, evidences and writings concerning the premises, *habendum* after the death of the grantor, for and during all the residue and remainder of the said term, which should be then to come and unexpired (a);

A termor for years, reciting his lease, grants the land and said recited lease, and all his deeds, &c. *habendum* after his death for the

(a) The assignment was "to the said M. her executors, administrators and assigns of all the said cottage, barn and lands, and all and singular other the

premises herein before recited, with the appurtenances, &c., together with the said recited lease, &c." Show. P. C. 199.

then residue of the term: An estate at will only passes.

[ \* 501 ]

If the grant be of all his term or estate with a similar habendum, the grant is good and habendum void (b).

A devise by a termor of his land, generally, passes the whole term: *aliter*, of a grant; which

only passes an estate at will (c).

A grant of his lease passes the term, unless it appears that the deed of lease only was intended (d).

A repugnant habendum is void: *aliter*, where it may consist with and explain the premises.

2 Rol. 66. 2 Co.

18. Com. Dig.

Falt, E. 9, 10.

4 Cruise Dig.

328-333, 2d ed.

Shep. Touchst.

113, &c. 1 East,

502.

and the question was, whether the term passed by this grant.

1. It was agreed in this case, that if a termor for years grants all his term or estate in the premises, *habendum* \* after his decease for so many years as should be then to come, the grant is good, and the *habendum* repugnant and void.

2. It was said *per Holt*, Ch. Just. that if a termor grants the land generally, and limits no estate, an estate at will only passes; but in a will it will be otherwise, for there the whole term will pass.

3. It was held here, that the grantor having granted the land (and not said his estate or his term) and the *habendum* being for such estate as will not pass by law, this only passes an estate at will.

It was objected here, that having granted the said recited lease was sufficient to pass the whole estate; and it was admitted, that if a termor grants his lease it will pass all his term; but in this case when he grants the land and the said recited lease, and all deeds, &c. it must by common intentment be the deed of lease.

It was agreed in this case that where the *habendum* contradicts the premises, the grant shall stand, and the *habendum* be void; but where the *habendum* may consist with the premises, it shall enure by way of explanation of it; as a grant to A. and his heirs, *habendum* to him and the heirs of his body, the *habendum* explains what heirs are meant. A grant to A. and B. *habendum* to A. for life, remainder to B. good.

But if a man grant to B. and his heirs in the premises, *habendum* to him for life, the *habendum* is repugnant and void, because an inheritance is granted by the premises (e).

(b) *Acc. Lilley v. Whitney*, Dy. 272 b. *Hogg v. Cross*, Cro. El. 255. *Preston's Shep. Touchst.* 114.

(c) Litt. § 68. Upon the argument on error it was doubted whether a grant of *all his land* by a termor for years would not pass the whole term, instead of creating a mere estate at will. *S. C. Skin.* 539, 542-3-4, and the case of *Smith v. Touchet*, cited *ibid.* See Com. Dig. Estates, H. 1.

(d) See *Show. P. C.* 206. *Skin.* 542. *Peto v. Pemberton*, Cro. Car. 101.

(e) This judgment was reversed in the Exchequer Chamber, *Skinner*, 528; and the reversal was affirmed in Parliament, *Show. P. C.* 199. The judges were much divided, and those who concurred in the reversal disagreed in the

reasons. *Show. P. C.* 200. *Skin.* 541-5. They seem however to have held that some of the words in the premises of the deed passed the whole term presently to the assignee, and that the *habendum* was repugnant and void. Note: that the grantor was dead, and consequently there was no dispute about his estate, *Show.* 206. The notion of an executory grant by a termor for years, to take effect after his death, was not allowed: *Skin.* 545. But see on this point 2 *Roll. Ab.* 66, cited by *Eyres*, 2. 12 *Mod.* 12. *Skin.* 535, *arguendo*. *Preston's Shep. Touch.* 114, 251. 2 *Prest. Convey.* 195. 10 *Viner*, 329, 330. *Stonell v. Hiche*, 2 *Salk.* 412. *Wright v. Gertwright*, 1 *Burr.* 282.



## PARSON'S CASE.

( C. 675. )

S. C. 2 Salk. 499. 1 Show. 283. 4 Mod. 61. Holt, 519.

PARSONS being convicted of murder obtained his pardon, and being brought to the bar pleaded it, and produced his writ of allowance, and the pardon had in it the word *murdrum*, and the allowance of it was opposed by Sir *H. Winnington* on the behalf of the prosecutor, who insisted upon it, that the king could not pardon murder at this time since the bill of rights, which had taken away the *Non obstantes*; and he insisted, that before the king could not do it without a *Non obstante* to the statutes of Ed. 3, and Rich. 2; and *Non obstantes* being now taken away, that he could not do it at all.

The king may pardon murder as well since as before the bill of rights: but *semb.* not by general words. 4 Black. Com. 400-1. 2 Hawk. c. 37, § 14.

3 Keb. 280.

\* But it was held by the whole Court, that this pardon [ \* 502 ] was good, and ought to be allowed; for that the king might at the common law have pardoned murder; and that appears by those very statutes which limit his power in that particular; and the drift of those statutes is no more, but that the king should not be surprised by pardoning it by general words; and therefore since the making of those statutes a pardon of felonies, &c. would not extend to pardon murder without a *Non obstante*; but if the king would recite the particular fact, as he had done here, his pardon would have been good without a *Non obstante*: therefore it seems a pardon in general words was (a) good, without reciting the fact and proceedings particularly, as in this case the indictment, conviction, and attainder were all recited.

Style, 375.

It was said *per Holt*, that in a pardon for murder there must be a writ of allowance, because there is a condition annexed to every pardon of murder; but a pardon for treason may be pleaded without any writ of allowance, because that is absolute (b).

A writ of allowance is necessary in a pardon for murder.

(a) *Quære*, "was not good?" and see 3 Mod. 37. 2 Hawk. ch. 37, § 17, 18. 3, which rendered the writ necessary. 2 Hawk. ch. 37, § 70. 17 Viner, p.

(b) *Accord*. 3 Inst. 235. T. Raym. 50, 51. On the present mode of allowing pardons, see 1 W. Black. 479. 2 Will. & Mar. ch. 13, repealing 10 Ed. *ibid.* 797.

## SIR SIMON LEECH'S CASE.

( C. 676. )

S. C. *Thompson v. Leach*, 1 Show. 296. 2 Vent. 198. Carth. 211, 250. Holt, 665. 3 Lev. 284. 3 Mod. 296.

LEECH, who married Serjt Crooke's sister, settled his estate to the use of himself for life, remainder to his first son in tail by that marriage, remainder in fee to an infant. Leech's wife being with child (by Sir G. Pudsey, as was supposed) he took advice how to destroy the contingent remainder to this child in case it should be a son; and by the advice of Serjt. Crooke and Serjt. Maynard, made a surrender of his estate for life to the remainder-man in fee (a); before he came of age the child was born, being a son; so that if the estate was not de-

A surrender vests no estate in the reversioner till acceptance: and *semb.* an infant reversioner cannot accept. *Reversed in Dom. Proc.*

(a) As to this point, see *Thompson v. Leach*, 1 Ld. Ray. 313. Fearn's Cont. Rem. 297, 317, 7th edit. Post, p. 508, C. 633.

stroyed before, it vested in him as soon as he was born; and the only point was, whether a surrender did vest or merge the estate in the reversioner before acceptance?

3 Co. 26.  
3 Barn. & Ald.  
31.

It was insisted, that a grant or conveyance did vest an estate in the grantee until disagreement; and if it were by feoffment, a disclaimer *in pais* would not serve, but it must be by deed or upon record.

[ \* 503 ] But it was on the other side insisted, that a surrender did differ from another grant, because in all pleadings where a surrender is pleaded, it is likewise alleged, that the reversioner did accept; and the Court seemed to be of opinion, that the estate did not vest till acceptance; and the reversioner not coming to age before the birth of the child, could not accept, and so the child was like to go away with the estate, which was at least 400*l. per annum*.

*Note*; This was upon a writ of error; judgment having been given in the Common Pleas, that the surrender vested no estate till acceptance, by the opinion of *Pollexfen*, *Powell*, and *Rokeby*, against *Ventris*, who seemed strongly of another opinion.

And afterwards the judgment given in the Common Pleas was affirmed.

*Note*; That in Michaelmas vacation, 1692, this judgment was reversed in parliament, against the opinion of all the judges, except *Atkins*, Ch. Baron, *come a moy fuit dit*. Show. Rep. 151 [*i. e. Show. Parl. Ca.*](b).

(b) There are several circumstances to be collected from the other reports of this case, which are worth noticing. The surrenderor remained in possession, and the surrenderee had no notice of the conveyance until five years after the making of it, and nearly five years after the birth of the contingent remainder-man; and then, and not till then, the surrenderee agreed to it and entered. No report except this of Freeman mentions the infancy of the grantee, but it is noticed *obiter* in another case between the same parties in Show. Parl. Ca. 151. See 2 Vent. 205. *Ventris*, the dissentient judge in the Com. Pleas, whose argument is to be found at large in his report, admitted that if the conveyance was inoperative to vest the estate until express assent, the relation by subsequent assent would not defeat the contingent remainder; 2 Vent. 200-1, and S. P. admitted by counsel *arguendo* in 1 Show. 298, 306, (although Levinz attributes to *Ventris* a different opinion on this point. 3 Lev. 285.)—He further held that the deed of surrender divested the life-estate of Leech, and vested it immediately in the surrenderee without express acceptance, or even notice to him, subject only to be re-vested in the surrenderor and rendered void *ab initio*, by express refusal: That consent was

indeed essential to every contract; but that it might be supplied by intendment of law in this and other cases where the conveyance was beneficial to the alienee: That a contrary doctrine would give rise to the absurdity of supposing that the estate might remain in the grantor notwithstanding his express grant, and would render it difficult for a stranger (so long as the operation of the conveyance was in suspense) to ascertain the real tenant of the freehold. See 2 Vent. 201-4. However, the judgment in the C. P. was unanimously affirmed in the K. B. (See the reports in Shower, Carthew, and 3 Mod.) but was afterwards reversed in Parliament in opposition to the opinions of all the judges except C. B. *Atkins*; agreeably to the report of Freeman. The argument of *Ventris* in his report concludes with a memorandum stating that the reversal in the House of Lords proceeded upon "the reasons in the foregoing argument:" upon which the editor's copy has the following M.S. note: "This memorandum was not Justice *Ventris*'s, for he was dead before this reversal in Parliament; nor were his reasons here reported the grounds upon which the majority of the Lords went, but they went upon a supposed equity, that Charles (the contingent remain-

“der-man) ought not to have the estate, “because they said he was a bastard. “This judgment was affirmed in B. R. “by the uniform opinion of all the four “judges there; and when it was in “Parliament, the Lord Chief Justice “Treby and Baron Powell were clear of “opinion to affirm it, but the Lords “reversed it against the opinion of nine “judges, *i. e.* Holt, Pollexfen, Treby, “Dolben, Powell, sen., Gregory, Roke- “by, Giles, Eyre, and Powell, jun., “then a Baron of the Exchequer.” In an action of ejectment brought in B. R. Hil. 9 Will. 3, between the same parties, in which the surrenderor was found to have been *non compos*, that court is reported by Salkeld to have recognized the doctrine laid down by Ventris in his argument, and adopted his language; see 2 Salk. 618, and 2 Ventr. 202-3. And such appears to be the prevailing opinion at this day, whatever may have been the ground of reversal in the Lords: See Watkins’s Conveyancing, p. 133, by Keene. Fonblanq. Treat. of Eq. B. 1, c. 3, s. 12. 1 Saunders’ Rep. 236 b, note (9), by Serjeant Williams. Sheppard’s Touchstone, by Preston, p. 285, 307-8. Butler’s Co. Lit. 337 b., note 294. Com. Dig. Surrender, A, F, N. 4 Cruise Dig. 12, 106. See also the following authorities bearing upon this subject: Doct. & Stud. Dial. 2, chap. 33. *Curtiss v. Cottel*, 2 Leon. 72. *Taylor v. Horde*, 1 Burr. 123. *Copeland v. Stephens*, 1 Barn. & Ald. 593. *Irons v. Smallpiece*, 2 *Ibid.* 551-4. *Wankford v. Wankford*, 1 Salk. 301-7. *Williams v. Bosanquet*, 1 Brod. & Bing. 238. *Townson v. Tickell*, 3 Barn. & Ald. 31, 37. *Petrie v. Bury*, 5 Dow. & Ry. 152. *S. C.* 3 Barn. & Cress. 358. Vin. tit. Disagreement. 5 Vin. 508-9. 20 *Ib.* 122-3.

The assertion of counsel in argument in the principal case, that a conveyance by feoffment cannot be disclaimed *in pais*, suggests some observations. It is frequently laid down in the more ancient authorities, that an estate of freehold cannot be waived, divested, or disclaimed, but by matter of record, while a gift of goods or a term of years may, before acceptance, be refused by parol, or matter *in pais*; see Bro. Ab. tit. Jointenauacie, pl. 57. Wayver des choses, pl. 41, 50. Fitz. Ab. Disclayme, pl. 23. *Butler and Baker’s case*, 3 Co. 26. *Curtiss v. Cottel*, 2 Leon. 72. *Anon.* 4 Leon. 207. Viner, tit. Disagreement & Waiver. Shep. Touchst. 285, 452. Fonbl. Treat. of Eq. B. 1, c. 3, s. 12; and the reason alleged is, that “the tenant to the *præcipe* should be the better known.” However, in *Townson v. Tickell*, 3 Barn. & Ald. 31, it was decided, that a devisee in fee may refuse the estate devis-

ed by a deed of disclaimer without matter of record; and Holroyd, J. was of opinion that even a deed was unnecessary (Shep. Touchst. 452, *accord*). In this case some of the above authorities were cited to shew that the renunciation must be of record; but no satisfactory answer was given to the inquiries of the court respecting the mode by which such a disclaimer was to be effected. An examination of those authorities will, perhaps, explain this doctrine, and lead us to the following conclusion, viz. that no estate *once vested and settled in the alienee by his express agreement* can afterwards be repudiated by him, except by pleading a disclaimer in a court of record. The ancient and ordinary conveyances at common law, by which estates of freehold were created, were feoffment, fine, and recovery. The first of these is ineffectual without livery of seisin, which necessarily amounts to an express acceptance. In the latter kinds of conveyance, the consent of the alienee is of course apparent by his being a party to the fictitious suit. Consequently in all these instances, the party will be estopped by his own solemn acceptance from receding from his contract. To one or the other of these modes of alienation the cases and writers above cited will, I believe, be always found to refer; and they sufficiently account for the general terms in which the rule is there expressed. Agreeably to this view of the subject, it is laid down by a respectable author, that “such lands, “the property whereof hath been *executed by possession*, cannot be wayved “but by matter of record. And it is “a certain rule, and sound reason, that “such things as cannot pass but by “matter of record, cannot be wayved “or relinquished but by matter of record.” Fulbeck’s Preparative to the Study of the Law, fo. 60 a. ed. 1600; and see Preston’s Shep. Touchst. p. 285. Nor is it to be understood that a party, who has once consented to receive a conveyance of lands, is at liberty to renounce his purchase by any *spontaneous* entry of a disclaimer in a court of record; 3 Barn. & Ald. 36; but it must be done, as it seems, by plea in an adverse suit. See further on the nature and effect of the plea of disclaimer, and the actions in which it is admissible, 3 Reeves’s English Law, 457. Theloal. Dig. lib. 11, c. 34. Doctrina Placitandi, 130, &c. Com. Dig. Abatement, F. 15. Viner, tit. Disclaimer. 1 Sheppard’s Abridg. p. 350-1. The subject of this note is also discussed in 2 Preston on Abstracts, 225-228. 3 *Ibid.* 104-7; and 1 Powell on Mortgages, by Coventry, p. 247, n.

## DE TERM. S. HIL. 1692.

IN BANCO REGIS.

( C. 677. )

SYMONDS v. CUDMORE.

S. C. 1 Salk. 338. 3 Salk. 335. Carth. 257. 4 Mod. 1. 1 Show. 370. Skin. 284, 317, 328. 12 Mod. 32. Holt, 666.

Where tenant in tail with reversion in himself in fee makes a reversionary

[ \* 504 ]

lease and dies, a fine levied by the issue in tail lets in the reversion and confirms the lease.

*Ante*, C. 666, p. 487. *Siderf.* 260.

1 Keb. 778.

Jones, 61.

2 Bulst. 42.

TENANT in tail, reversion to himself in fee, with a power to make leases in possession, makes a lease for twenty-one years, and afterwards makes another lease to commence upon the determination of the first lease; before the second lease commences, tenant in tail dieth, and the issue in tail \* levied a fine in order to make a settlement; and it was held by all the judges, that this fine had made the second lease unavoidable, because by the fine the estate-tail was as it were merged in the fee, and he had no way to avoid the lease, but only by virtue of the estate tail, which was now destroyed.

*Note*; This case I had by report only, and it was thought a hard case (a)

(a) See *Kynaston v. Clarke*, 2 Atkins, 204. *Shelburne v. Biddulph*, 4 Bro. P. C. 594. *Sperling v. Trevor*, 7 Vesey, 497. *Martin v. Strachan*, Willes, 454.

S. C. 5 Term Rep. 109, n. 1 Preston Convey. 9, 10. 3 *Ibid.* 241, 347, 455. 2 Cruise Dig. 475. 5 *Ibid.* 196, 252. 2d edit.

## DE TERM. PASCHÆ, 1693.

IN BANCO REGIS.

( C. 678. )

DR. HASCARD v. DR. SOMANY.

Acts of the majority are binding in a corporation. But the major number of the whole ought to be present, unless it be otherwise provided by the original constitution or antient usage.

IN a trial at bar for the parsonage of Hasely in the county of Oxon, the church being in the presentation of the Dean and Canons of Windsor, where there are twelve canons besides the dean, which in all make up thirteen of the corporation, it was held,

1. That *prima facie* in all acts done by a corporation, the major number must bind the lesser, or else differences could never be determined.

2. That acts done by the corporation ought to be done by the consent of the major number, or else they are not valid; and therefore where the corporation consists of thirteen, there ought to be seven to make a chapter; but the act of the major number of those seven is binding to the corporation.

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\* But if the antient usage hath been, that acts have been done from time to time by the major number of those that are present, although they are but three or four, it shall be then intended that that was part of their constitution at

the beginning; and so what is done by them shall be binding to the rest; and if it were otherwise, it would avoid multitude of leases; for it is the common practice in most places to seal leases by the major number of the dean and prebends that are resident at the time when the lease was made (a).

*Semb.* Leases sealed by the majority of the chapter resident at the time, are generally good by usage.

(a) That the major part of the whole chapter must be assembled in order to do a corporate act, see the case of the *Dean and Chapter of Fernes*, Davis's Rep. 47, b. Watson's Clergyman's Law, ch. 44. 2d vol. p. 838, ed. 1712. 1 Burn Eccles. Law, by Tyrwhitt, p. 281, and note (x) *ibid*; and see stat. 33 Hen. 8, c. 27. 2 Burn Ecc. Law, 115-6-7. *Case of New College*, Dy. 247, a. So when an act is directed to be done by a body of a definite number, the major part of the whole body must be present, unless there be an antient usage or special provision to the con-

trary. But if the corporation consists of an indefinite number, the majority of those actually assembled, however few, may bind the whole body. See *Queen v. Lock*, 6 Viner, 269. *Attorney-Gen. v. Davy*, 2 Atk. 212. *R. v. Parlo*, Cowp. 248. *R. v. Monday*, *Ibid.* 530. *R. v. Grimes*, 5 Burr. 2598. *R. v. Bellringer*, 4 Term Rep. 810. *R. v. Miller*, 6 *Ibid.* 268. *R. v. Morris*, 4 East, 17. *R. v. Bower*, 1 Barn. & Cress. 492. *S. C.* 2 Dow. & Ryl. 761. *R. v. Devonshire*, 1 Barn. & Cress. 609. 3 Dow. & Ryl. 83. *Gwill. Bac. Ab. Corporations*, (E). 7.

### WINCEHURST v. STOCKHAM.

IN a writ of error to reverse a fine, it was agreed,

1. That the conusor dying before the return of the *dedimus*, and after the caption, was erroneous. Shep. Abr. 178. 1 H. 7, 9 (a).

2. Where two parceners are entitled to a writ of error, and one releases, that release is no bar to the other.

3. That although five years incur after the levying of the fine, yet the party is not barred of his writ of error to reverse the same fine, which, as *Holt* said, had been resolved in *Hale's* time upon solemn argument in this Court: And *Pemberton* said he was of the same opinion, but was a little staggered at a case he met with of the Earl of *Oxford*; but *quære* in what book? (b)

( C. 679. )

Death of conusor of fine before return of *dedimus*, and after caption, is error. Release of one parceners is no bar to writ of error by another. Writ of error to reverse a fine is not barred by lapse of five years.

(a) 1 Roll. Ab. 757, pl. 30. Dy. 89, b. 5 Cruise Dig. 280.

(b) See *Bartholomew v. Belfield*, Cro. J. 332. *Anon.* 1 Vent. 353. *Cock-*

*man v. Farrer*, T. Raym. 461. *S. C.* T. Jo. 181. Bacon's Tracts, p. 39, &c. *Zouch v. Thompson*, 1 Ld. Ray. 177. 13 Viner, 269.

### LONG'S CASE.

( C. 680. )

*S. C. Reeve v. Long*, 3 Lev. 408. 1 Salk. 227. Carth. 309. Comb. 252. 4 Mod. 282. Skin. 430. 12 Mod. 53. Holt, 228.

AN estate was devised to A. for life, remainder to his first son, &c. remainder to B. and his heirs.

A. dies without issue, his wife *enscint* with a son; B. enters; the son is born and enters upon B.

This case was first argued upon a special verdict in the Common Pleas, where the Court were all of opinion, that, A. dying before the birth of the son, the contingent remainder to the son was destroyed, and that B. the remainder-man

Under a devise to A. for life, remainder to his first son, &c. a son *in ventre matris* at A.'s death may take.

had a good title; and upon a writ of error brought, the Court of King's Bench were of the same opinion.

Dec. 1694.

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Cro. Car. 87.  
Lit. Rep. 316.  
Butl. Fearn, 308-9.

But afterwards a writ of error being brought in parliament, \*the Lords reversed the judgment; which (*come a moy semble*) doth in a great measure destroy the doctrine of contingent remainders, which is, that if it doth not vest when the particular estate determines, it can never vest (a).

(a) All the judges were dissatisfied with the reversal; 3 Lev. 408. In *Thelluson v. Woodford*, 4 Ves. jun. 342, Lord Roslyn said, that it ought always to be remembered that this was the decision of Ld. Somers; and that it was not the only case in which he stood against the majority of the judges; and that the better consideration of subsequent times had shewn that his opinion

deserved all the regard generally paid to it. The above decision occasioned the stat. 10 & 11 Will. 3, cap. 16, which by implication affirms it, and extends it to limitations in deeds and settlements. Harg. & Butl. Co. Lit. 298, a. (n. 3). 2 Saund. 387, note (7), by Williams. 2 Cruise Dig. 330-1, 2d ed.; and see 2 Harg. Jurid. Arg. p. 115-6. *Roe v. Quartley*, 1 Term Rep. 630.

( C. 681. ) DOMINUS REX v. ——— ONE OF THE LORD MONTAGUE'S WITNESSES.

Perjury, whether by stat. 5 Eliz. or at common law, must be in a material point. Perjury within the stat. must be committed in a court of Record, or other court mentioned therein: *secus*, of perjury at common law. 5 Mod. 348.

*Ante*, p. 17, C. 17.

IF a man be indicted upon the statute, it must appear in the indictment or information, that the point he was forsworn in was material to the matter in issue, and it must be in a Court of Record, or other courts mentioned in the statute; and other circumstances must be pursued, according to the description in the statute.

And if a man be indicted for perjury at common law, it must be for a thing that is not altogether foreign, but must have some relation to the matter in question; as if a witness should swear what clothes he had on when he saw such a fact done, it is altogether foreign to the matter in question; and if he were mistaken, it is not perjury at common law.

But perjury at common law may be in a court which is not of record, as in Chancery, or in a court-baron, if in a material point; and so may perjury upon the statute by express words. 3 Inst. 164.

These cases were cited in relation to perjury, 1 Sid. 274. 3 Inst. 164. 2 Roll. 369.

(C. 681b.)

Office of an innuendo. 1 Ld. Ray. 256. 1 Saund. 242 b. n. (4).

AN *innuendo* shall neither enlarge, alter, nor abridge the sense of what it is annexed to. Allen, 32. Cro. Eliz. 193. Palmer, 358. 4 Co. 17, 20. 3 Bulstrode, 265. Godb. 339, 340. Hob. 45. Cro. Car. 512. Hob. 2, 6. 2 Cro. 167, (126), 144. Goldsb. 191. 1 Roll. 86. 1 Vent. 268, (337). 2 Roll. Rep. 141, 142.



## DE TERM. S. MICH. 1697.

IN BANCO REGIS.

WINTER v. LOVEDAY.

( C. 682. )

S. C. Comyn, 87. 1 Ld. Ray. 267. 2 Salk. 537. Comb. 371. Carth. 427. 5 Mod. 244, 378. Holt, 414. 12 Mod. 147.

THE case:—A settlement was made of a manor to A. for life, remainder to B. his wife for life, with remainders to the first and other sons in tail, &c., provided that A. or B., being in possession, should have power to make leases for twenty-one years of the said manor, or any part thereof, except the demesnes, reserving the usual rent. A. made a lease for twenty-one years of a copyhold estate; and the question was, whether this lease was warranted by the power?

1. The first question was, whether the copyholds of the manor are part of the demesnes? And for that it was held, that they were beyond all question. 1 Co. 46.

But then it was objected, that if the copyholds should be taken to be parcel of the demesnes, and so excepted, that the exception would be repugnant; for then the power would be void, there being no land besides the demesnes.

But to that it was answered by *Holt*, Ch. Just. that the power would not be void, for A. might by virtue of that power demise the rents and services, which would be good by virtue of the power, although he could reserve no rent upon such a lease; for he said where there was a general power given, which extended to the whole estate, with a qualification which extended only to part, there the other part might be demised by virtue of the power, though it was not capable of the qualification. As where a settlement is made with a power to demise all, or any part, reserving the usual rent, and part of it was never in lease before, a lease may be made of that part under what rent the party pleaseth; and for that he cited 2 Rol. tit. Power, 262; and the case of *Wakeman and Waker*, ante, Case 546, [p. 413,] which he said was resolved, according to the opinion of *Hale* there, that the lease of tithes was good, although 5s. an acre could not be reserved (a).

It was said also, that if this power should extend to the copyholds, it would put it in the power of the tenant for life to destroy all the copyholds; for although if a lessee of a manor make leases of the copyholds, it doth not extinguish them; yet when a lessee by virtue of a power demiseth, that is an absolute destruction of them; because the power is derived out of the fee, and so it is all one as though tenant in fee-simple of a manor made a lease. 1 Roll. 510.

Under a power to lease a manor or any part thereof, except the demesnes, reserving the usual rent, copyholds cannot be leased; but the services may.

Where there is a power of leasing with a qualification annexed, which extends only to part of the estate, the other part may be leased without regard to the qualification.

[ \* 508 ]

If tenant for life of a manor leases a copyhold under a power, the copyhold is absolutely destroyed. Harg. Co. Lit. 58 b. n. (7). Gilb. Ten. 222-3. 1 Cruise Dig. 301, 384, 2d ed.

(a) See the references in note (a) to *Wakeman v. Waker*, ante, p. 414. 2 Thomas's Co. Lit. 435.

( C. 683. )

ANONYMUS.

*Semb. S. C. Thompson v. Leach*, 1 *Ld. Ray.* 313. 2 *Salk.* 427, 565, 576, 675. 3 *Salk.* 300. *Comyn*, 45. *Comb.* 438, 468. *Carth.* 435. 3 *Mod.* 301. 12 *Mod.* 173.  
*Show. P. C.* 150. *Holt*, 357, 623.

Whether a surrender by *non compos* be void or voidable only? A right of entry will support a contingent remainder, if it exist when the contingency happens. *Butl. Fearné*, p. 286-290.

*Ante*, p. 502.

A contingent remainder, destroyed by the alienation of the particular tenant, may be revived by his entry for a condition broken before the vesting of the contingency. *Butl. Fearné*, 349. *Bac. Ab. Remainder*, (G).

SETTLEMENT made to the use of the father for life, remainder to the first son and the heirs of his body, remainder over. The father, being *non compos*, before the birth of the son surrendered to the remainder-man; and the question was, whether this had destroyed the contingent remainder? And that depended upon this, whether this deed of surrender was void, or only voidable: for if it was void, then the contingent remainder was not destroyed; but if it were only voidable, then it not being avoided at the time of the birth of the son, the contingent remainder is destroyed; for if the particular estate or a right of entry be not in being when the contingent remainder ought to vest, it can never vest.

And *Holt* put this case, that if the tenant for life, before the birth of the first son, had granted away his estate upon condition, and had entered for the condition broken before the birth of the first son, it would well enough have supported the contingent remainder; but if he had not entered, or had a right of entry at the time of the birth of the first son, the contingent remainder was destroyed, although the condition should be after broken. The principal case was adjourned to be argued again the next Term (a).

(a) Adjudged that the surrender was merely void; and the judgment was affirmed in *Dom. Proc. Show. P. C.* 150. See further on the avoidance of conveyances by lunatics, 2 *Black. Com.* 291. *Zouch v. Parsons*, 3 *Burr.* 1794,

1807. *S. C.* 1 *W. Black.* 575-9. *Fonbl. Treat. of Eq. B.* 1, ch. 2, § 1. 1 *Powell on Contracts*, p. 10, & *seq.* *Sugden on Powers*, 395, 2d edit. *Com. Dig. Ideot*, D. 1, 2. *Bacon's Ab. Ideots & Lunatics.* (F).

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DE TERM. S. MICH. 1699.

IN BANCO REGIS.

( C. 684. )

UNDERHILL v. DURHAM.

S. C. 2 *Gwillim*, 542.

Copy of a parliamentary survey under the Commonwealth admitted in evidence, the original having been destroyed. 11 *East*, 280. 1 *Maul. & Selw.* 292. 4 *Dow*, 325.

IN a trial at bar concerning a lease, and when the same was to take effect in possession, a copy of a survey taken in the late times, in 1647, by virtue of a commission granted by the powers then in being, was admitted as evidence; and it was then said, that those surveys were taken with great care, and had been often admitted in evidence: but the reason why the copy was admitted here was, because it was proved that the originals were removed from Gurney-house to St.

Faith's under St. Paul's, and were there burnt in the great fire; and *Northey* shewed me a case in Michaelmas, 25 Car. 2, B. R. between *Berry* and *Halsted*, where such a survey was admitted in evidence by *Hale*, Ch. Just.

HELIER v. JENNINGS.

( C. 685. )

S. C. 1 Ld. Ray. 505. Comyn, 90, 94. 12 Mod. 276. Carth. 514.

A. THE father, having issue a son and two daughters, deviseth the estate in question to his son and his heirs; provided nevertheless, that if the son should die before he comes to the age of twenty-one, or without issue of his body, then it should go to the daughters: The father dies, and the son lives to the age of twenty-one, and makes his will, and deviseth the estate to the plaintiff; \* and his will was attested by the plaintiff and two other witnesses; and then died without issue.

A devise to A. and his heirs, and if he dies before the age of 21, or without issue of his body, then to B. &c. gives A. an

[ \* 510 ] estate-tail. Devisee under a will is not a "credible witness" to it within the statute of frauds.

And the question was, whether the plaintiff who claimed under the will of the son, or the defendant who claimed under the daughters, had the best title?

The first question was, whether this was an estate-tail or a fee in the son, by the will of the father; and for the plaintiff it was said, that this was a fee, and upon a contingency it might have been an estate-tail; that is, in case the son had died without issue before twenty-one; for it was said that *or* in this place (1) must be taken for *and*; and then although he did die without issue, yet living beyond the age of twenty-one, the devise to the daughters could not take effect; and for this was cited 1 Vent. 162. Plow. 286. Cro. Eliz. 382, 525. Moor, 422.

(1) *Vid.* 1 Ld. Ray. 506. 12 Mod. 277. 5 Cruise Dig. 183, 2d edit.

2. *Qu.* If the son had a fee, whether this will was attested according to the statute of frauds and perjuries; and for the plaintiff it was said, though the plaintiff who claimed by the will could not be brought to give evidence in a Court to prove it, yet that he was a credible witness within the statute; for by credible witnesses is meant persons of credit, such as have not been disabled by any conviction of perjury, forgery, or any verdict in attain, &c. nor whose credit is not to be objected to.

But the Court in both points inclined against the plaintiff, viz. that the son had but an estate-tail, and so the devise to the daughters took effect, the son being dead without issue; for though it is devised to him and his heirs, yet the latter words "if he die without issue" make it an estate-tail; for his meaning seems to be plain, that if the son had issue, that issue should have it, if not, it should go to the daughters (a).

And as to the second question they held clearly, that the

(a) *Brice v. Smith*, Willes, 1. *Doe v. N. 5.* 6 Cruise Dig. 290, et seq. 2d ed. *Ellis*, 9 East, 382. *Dansey v. Griffiths*, 2 Vern. 377. 4 Maul. & Sel. 61. Com. Dig. Devise,

party who was to take by the will could be no such witness as was intended by the statute, because he can be no witness at all, and much less a credible witness; for suppose they had all three been persons who had taken by the will, then the will could never have been proved; and though one good witness is sufficient proof, the other two must be such as are qualified to be witnesses (b).

(b) Judgment for the defendant, 12 Mod. 277. According to Carthew, who was counsel, the will was only held void *quoad* the devise to the witness; Acc. 1 P. Will. 457-8. Per Powell *inter—ex dimis. Went. Dilke and—*cited Com. Dig. Devise, E. 1. 1 Burr. 428. *Sed vid.* 2 Stra. 1255. For decisions upon the meaning of "credible witness," see Com. Dig. Devise, E. 1. Viner, Devise, N. 13. *Hudson's case*, Skinn. 79. *Baugh v. Holloway*, 1 P. Will. 457. *Holdfast, d. Anstey, v. Dowling*, 2 Stra. 1253. S. C. 1 Will. Black. 8. *Wynd-*

*ham v. Chetwynd*, 1 Burr. 414. S. C. 1 W. Black. 95. *Hindson v. Kersey*, 4 Burn. Eccles. Law, 97, 8th ed. *Pendock v. Mackinder*, Willes, 665. S. C. 2 Wilson, 18. *Bettison v. Bromley*, 12 East, 250. *Phipps v. Pitcher*, 2 Marsh, 20. S. C. 6 Taunt. 220. 1 Mad. Rep. 144. *Brograve v. Winder*, 2 Ves. jun. 634. *Hatfield v. Thorp*, 5 Barn. & Ald. 589. 1 Fonb. Treat. of Eq. 197, n. Bull. Ni. Pri. 265. 2 Bl. Comm. 377. A beneficial devise to an attesting witness is made void, and his credibility established by 25 Geo. 2, c. 6.

[ 511 ]  
( C. 686. )

A man shall not marry his wife's sister's daughter.

#### ABRAHAM or KENNESLEY v. BIRD.

*Semb. S. C. Clement v. Beard*, 5 Mod. 448.

THE plaintiff had married his wife's sister's daughter, and was prosecuted for it in the Ecclesiastical Court, and prayed a prohibition. *Shower* moved to discharge the rule for a prohibition *nisi*, and cited Cro. Eliz. *Man's case*, 228. *Noy —. Vaughan —.* Hob. 181.

*Holt*, Ch. Just. inclined against the prohibition, for he said, to marry a man's father's sister's daughter (a) is forbid by the levitical law, and this is the same degree of affinity as that is of consanguinity, which he takes to be under the same prohibition: a rule for a consultation *nisi*!

And *Shower* cited a case between *Wortesley* and *Watkins*, Trin. 30, 31 Car. 2, in this Court, where it was held to be an incestuous marriage.

(a) This seems to be a mistake: a daughter, would be within the same man's father's sister, or his sister's degree.

*Ante*, C. 334, p. 287, and note *ibid.*

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#### DE TERM. S. HIL. 1699.

IN BANCO REGIS.

( C. 687. )

#### GAGE v. ACTON.

S. C. Comyn, 67. Carth. 511. 1 Salk. 325. 12 Mod. 288. 1 Ld. Ray. 515. *Holt*, 309. *Lilly's Entries*, 213.

Debt for rent on a demise by deed or parol is

THE case was, the plaintiff brought an action of debt against the defendant, as administrator to her husband, for rent be-

come due in the life-time of the intestate. The defendant pleaded that her husband, before his intermarriage with her, became bound to her in a bond of 2000*l.* conditioned to leave her 1000*l.* at the time of his decease, in case she survived him, and averred, that she had not assets *ultra* 250*l.* which was not sufficient to satisfy that bond, and that she retained towards satisfying that debt; and the plaintiff demurred; and two questions were in the case:

1. Whether a debt for rent should be preferable to a debt by bond? And for that they were all of opinion, that they were in *æquali gradu*, and whether the lease was by writing or parol, it was all one. [3 Lev. 267].

2. Question was, whether this bond was not released by the marriage, the bond being given before marriage? And this was said to be a point of great consequence; and *Gould* and *Turton* were of opinion, that the bond was not released by the marriage; because by the condition the money is not to be paid until the death of the husband.

But *Holt*, Ch. Just. *è contra*; for a bond is *debitum in præsentia*, although by the condition it be *solvend. in futuro*; he admitted, that if a man before marriage promise a \*woman to leave her 100*l.* at his death in case she survive him, this is not released; because it cannot possibly happen during the coverture; and this is like a condition precedent, so that if a man declares upon such a promise, he must aver that the husband is dead, and that she survived him, &c.; but it is not so in case of a bond with a condition; for there the party declares upon the bond only without taking notice of the condition. 5 Co. 70. *Hoe's case*.

But a contingency which may or may not happen during the time of the marriage may be released by the husband, as where a term for years is devised to A. for life, and after his decease to the wife of B., there B. the husband may release, because the contingency may happen in the life-time of the husband. 3 Rep. Canc. 21.

And where the husband might release, if a promise were made by a stranger, there marriage is a release, if the promise were made by the husband.

*Note.*—If the obligee make the obligor executor, the debt is extinguished; but if the executor of the obligee makes the obligor executor, this doth not extinguish, because *in auter droit*, and would be to the prejudice of the creditors; and so if an executor hath a term for years, that is not extinguished by taking a grant of the reversion, because the term is *in auter droit* (a). [See S. C. Post, p. 515.]

(a) S. P. dict. per Holt, C. J. in S. C. 164. But see C. 338, ante, p. 289, and 1 Ld. Ray. 520. 2 Fonbl. Treat. of Eq. the note *ibid*.

in equal degree with a bond debt. Acc. Wentw. Ex. 146, edit. 1763. Barnes, 290. Ante, C. 283, p. 262. A bond by the husband to his wife before marriage, conditioned to leave her 1000*l.* at his decease if she survives, is not extinguished by marriage: per 2 Just. Holt, C. J. dissentiente. Hob. 216. Post, p. 515, n. (b).

[ \* 513 ]  
See also Holt's argument, post, p. 515.

## CORONE.

( C. 688. )

Hil. 1673.

*S. C. Bellew & Norman's case*, 1 Vent. 254. 2 Lev. 98. T. Raym. 234. 3 Keb. 278.

Upon conviction for clipping the judgment is to be drawn and hanged, but not quartered. Acc.

[ \* 514 ]  
1 Hale H. P. C. 215-221. 2 Hale H. P. C. 398. T. Jo. 233.

THREE Frenchmen being convicted of clipping, when they came to give judgment, the Court said, that sometimes judgment in such cases had been, that they should be hanged, drawn, and quartered; and of that opinion is my Lord Coke, 3 Inst. 17; and sometimes, that they should be hanged and drawn, and of that \* opinion was the Court now. [Cro. Car. 383.] And Ch. Justice *Hale* delivered his reasons to be, for that this was no treason at the common law, but coining was; but the party for it was only to be drawn and hanged; and then although this be newly made treason by act of parliament, yet being of the same nature with coining, he thought it reasonable that the judgment should be the same as in that. And of that opinion were the whole Court; whereupon judgment was pronounced by Justice *Twisden*, being the senior Judge, that they should be hanged and drawn. And it being some doubt, whether or no the judgment in high treason ought to be pronounced by the senior Judge, or the Chief Justice (1), after *Twisden* had pronounced it, the Chief Justice pronounced it again.

(1) 1 Vent. 254. Kely. 11. 1 Burr. 650.

( C. 689. )

## THODY'S CASE.

A. and B. engage in a quarrel with C. and D.; A. fights with C., and B. with D.; A. kills C.: B. is equally guilty of manslaughter with A.  
1 Hale's H. P. C. c. 54. 3 Stark. Rep. 97.

It was delivered for law by the whole Court, that if two persons of a side engage in a quarrel, and each of them singles out his adversary, and one of them is killed; as well the companion of him that killed the other, as he himself, is guilty of the manslaughter; and if they came with malice prepensed, they are both guilty of murder; and if he that killed him came with malice prepensed, and the other not, the one is guilty of murder, and the other of manslaughter; and so Thody was found guilty of manslaughter, though his brother killed Blunfield of Gray's Inn with a tobacco-pipe, wherewith he struck him in the eye.

( C. 690. )

## STALYE'S CASE.—Mich. 1678.

What words amount to high treason. Foster, 200. 2 Salk. 631.

HE was indicted for high treason for saying these words in French:—*Le Roy de Anglitterre est un grand heretique le plus grand buggerer (rogue) en la nation, et si n'ascun voile tuer luy, jeay mon ceur icy ma maine jeo voile tuer me même*: and, being found guilty, had judgment to be executed as in case of high treason.



## DE TERM: S. MICH. 1699.

IN BANCO REGIS.

GAGE v. ACTON.

( C. 691. )

S. C. ante, p. 512.

If a term be devised to A. for life, remainder to B. for life; the husband of B. may release this possibility; and if A. survives the husband, so that this doth not come *in esse* until after the death of the husband, yet she shall be barred; but the reason is, because that is a possibility which might have happened in the life-time of the husband. But if a man promiseth a woman, or covenants with her, to pay her 100*l.* in case she survives her husband, there the husband cannot release, because the contingency cannot happen in the husband's life-time; and that is the reason of *Smith* and *Stafford's* case, Hob. 216. Yelv. 156, 193. 2 Cro 222, 254 (a).

A contingent interest of the wife's, which may by possibility vest during the husband's life, may be released by him. 1 Ld. Ray. 519. *Ante*, p. 513.

But in this case the bond itself is released; and for these reasons,

1. The husband cannot be a debtor to his wife during the marriage.

2. This debt cannot be sued for, because the wife can bring no action against the husband.

3. An obligor may, if he please, pay the penalty of a bond before the money is due by the condition, and if he doth, the bond is discharged; so that if this debt did subsist after marriage, the husband might pay the money to the wife, and discharge the bond, and then the money was his own again. So *Holt*, *fortiter*, that the bond was released; but the other two Judges being contrary, judgment was given for the defendant (b).

Obligor may discharge himself by paying the penalty before the money is due by the condition: *per Holt*, C. J. *Vid.* 1 Fonbl. Eq. 153, 5th edit.

(a) What interests of the wife may be released by the husband, see Bac. Ab. Release, (F). *Smith v. Wotton*, ante, p. 291. *D'asth v. Baux*, 10 Mod. 63. *Miles v. Williams*, 1 P. Will. 255. *Salkeld v. Vernon*, 1 Eden, 64; and see *Dalbiac v. Dalbiac*, 10 Vesey, 122. *White v. St. Barbe*, 1 Ves. & B. 405.

(b) See a further report of the arguments of the judges in Ld. Raymond and 12 Modern Rep. Carthew says, that a writ of error was brought in the Exchequer Chamber, but the plaintiff in error, perceiving the court inclined to affirm the judgment, did not proceed; Carth. 513. And see the observations of Buller and Grose, JJ. in *Milbourn v. Ewart*, 5 Term Rep. 386-7. Relief was given in equity; see *Acton v. Pierce*, 2 Vern. 480. Preced. Chan. 237; and

in *Milbourn v. Ewart*, *supra*, a similar bond was adjudged good at law and not released by intermarriage; and Lord Kenyon "lamented that Lord Holt had recourse to such sly and technical reasonings to enforce a case so directly against law and conscience." And see *Hayes v. Foord*, cited 5 Term Rep. 386. See also the following authorities: *Luprat v. Hoblin*, 2 Sid. 58. *Darcy v. Chute*, Chan. Ca. 21. *Pridgeon's case*, *Ibid.* 118. *Anon.* 1 Vent. 344. *Cannel v. Buckle*, 2 P. Will. 242. *Marriott v. Thompson*, Willes, 188. Harg. & Butl. Co. Lit. 264, b. n. 2. 1 Fonbl. Treat. of Eq. 101-2, note (a), Bac. Ab. Baron & Feme, (E). 4 Viner, 161-4. *Heeding v. Davies*, Skinn. 409. S. C. Comb. 242.

( C. 692. )

*S. C. Eastcourt v. Weeks*, 1 Salk. 186. 1 Lutw. 799.

The surviving coparcener of a manor, who is also heir to the deceased, cannot enter for a forfeiture (as for waste or a lease without licence) committed by a copyholder in her sister's lifetime. *Powell, J. dissent.*

Permissive waste is a forfeiture of a copyhold (b).

Freebench is defeated by a forfeiture, surrender, or by a lease with licence, by the husband.

1 Mod. Rep. 120.  
Cro. Car. 569.  
Cro. Car. 283.

Latch, 227.

One coparcener cannot enter for her moiety on a forfeiture. *Semb.*

Two coparceners of a manor, where by the custom the woman had her free-bench, viz. her widow's estate. The husband being a copyholder made a lease without licence, and suffered his house to go out of repair, and dies; and then one of the coparceners dies; the wife enters after the death of the husband, and repairs the house; the surviving coparcener and the heir of him [*her*] that was dead enters (a); and the question was, whether the entry was lawful?

1. It was agreed, that the lease and the want of repairing were both forfeitures.

2. That if the husband forfeited, the wife lost her free-bench; for, as if he surrendered, it defeated his wife of her free-bench; so if he did any act which determined his estate, it destroyed her free-bench. And *Treby, C. J.* said, this case was referred to him, viz. a copyholder surrendered his estate to make a mortgage, and died before the mortgagee was admitted, so that the estate remained in him at the time of his decease; and by the custom of the manor the widows were intitled to their free-bench; and after the death of the copyholder the mortgagee was admitted. He advised with the Judges of the King's Bench upon it, and determined it, that this admittance related to the surrender; that although the husband died seised, yet the wife should not have her free-bench; and so it was said to be lately resolved in the King's Bench (c).

And so if a copyholder makes a lease by licence, this will defeat the wife of her free-bench (d).

But the great question here was, whether, here one of the parceners dying before entry, an entry can afterwards be made? It was agreed, that an heir shall not enter for a forfeiture committed in the life of his ancestor; and so the Court inclined in this case, notwithstanding one of the coparceners were living; for a forfeiture shall not be divided, and she cannot enter for her moiety. The Court seemed to incline, that when they were both living, unless they should both agree, that neither of them should enter. *Cur' advisare vult.*

Afterwards, Term. Pasch. 1700, *Treby, Nevil* and [*Blen-cow*] were of opinion, that one of the coparceners dying before entry, no advantage could afterwards be taken of this forfeiture. And *Treby* took this difference, that in some

(a) The survivor was heir to the deceased coparcener. See Salk. & Lutw. Rep.

(b) Co. Lit. 63 a. and Hargrave's note, *ibid.*

(c) Probably in the case of *Benson v. Scott*, 1 Salk. 185. Carth. 275. 3 Lev.

385. See 2 Watk. Copyholds, by Coventry, 4th edit. p. 60-3.

(d) Acc. Cowper, 481, in the case of *Salisbury v. Hurd*. *Quære*, as to endowment after the expiration of the lease? Gilb. Ten. 321. 2 Watk. Cop. by Coventry, p. 62.

cases an heir might take advantage of a forfeiture; but that was \* of such acts as were as well extinguishments of the copyhold estate, as forfeitures; as where a copyholder levied a fine, suffered a recovery, or made a feoffment with livery, there the copyhold estate was extinguished; because the copyholder had taken upon himself to convey the freehold, which was inconsistent with a copyhold estate; but where a copyholder makes a lease for years, or commits waste, these are forfeitures at the election of the lord; and therefore if he takes no advantage of them by entry, but doth any act afterwards which admits him to be a copyholder, the forfeiture is purged (e); as if he receives the rent, or accepts a surrender, or amerces him in his Court; but in the other case no act of the lord can purge the forfeiture, because in case of a fine, recovery, &c. the copyhold is utterly extinguished.

[ \* 517 ]  
Where the act of a copyholder is an extinguishment of his copyhold, the heir may enter for it: *aliter*, if it be only a forfeiture at the lord's election.  
*Per Treby, C. J. Acc. Roe v. Hallier, 3 Term Rep. 162.*

Therefore if the lord, to whom the wrong is done, doth not make his election to make it a forfeiture by entry, his heir shall never take advantage of it.

He said he agreed with the opinion of Rolle, that a feoffment with [*without*] livery, or a bargain and sale without enrolment, are no forfeitures, because imperfect conveyances, and not executed.

*Powell* insisted, that a copyholder was but a tenant at will in the nature of his estate; although his estate be so strengthened by custom, that so long as he observes the customs of the manor, it is not in the power of the lord to defeat or determine it; but yet the copyholder might determine it when he pleased.

That when a copyholder took upon him to make a lease for years, his estate was determined; and if his estate was determined the heir might take advantage of it as well as his ancestor. But the other three Judges being of another opinion, judgment was given for the defendant.

(e) As to what is a dispensation of the forfeiture, see *Com. Dig. Copyhold*, M. 8. *Roe v. Hellier*, 3 Term Reports, 162, 171.

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## DE TERM. S. MICH. 1702.

[ 518 ]

IN BANCO REGIS.

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### POINTS NOW DEPENDING IN THE KING'S BENCH ABOUT SETTLEMENT OF THE POOR. ( C. 693. )

A MAN, inhabiting and settled in a parish, hath several children born there, and then removes into another parish, and rents a tenement of above 10*l. per annum*, and then fails in the world, his children then being above seven years old;

and the question was, which parish they should be settled in, whether in the first parish, where they were born, or in the last parish, where their father had acquired a settlement? My Lord Chief Justice was of opinion, that they should be settled in the first parish. But *Powell è contra*; so it was adjourned to the next term (a).

Another question was, a single man is hired for a year, and about a month before his year is up marries, and serves up his year; and the question was, whether this hiring and service shall acquire a settlement within the late act of parliament (b)?

Whether hiring and service as a curate will acquire a settlement? 2 East, 65.

Another question was, whether a curate, that is hired for a year, shall thereby acquire a settlement as a hired servant? The justices in Buckinghamshire differing in opinion, it was referred to the Chief Justice for his opinion in his chamber.

(a) *Semble, S. C. Osmer Parish v. Milton Parish*, 2 Salk. 528. 3 *Ibid.* 259. Fortesc. 322. 6 Mod. 87.

(b) *Semb. S. C. Parishes of Farringdon and Witty or Wilcot*, 2 Salk. 527-9.

[ 519 ]  
( C. 694. )

### ROOKE v. ROOKE.

S. C. 2 Vern. 461. Prec. Chan. 202. 1 Ab. Eq. 210.

T. R. devises certain lands to A. for life, and then devises "that all the rest and residue of his lands and tenements not expressly disposed of should be sold by his executors, &c." The reversion of the lands devised to A. passes to the executors.

THO. ROOKE, the plaintiff's grandfather, being seised of the lands in question, by his will devised them to the defendant his eldest son by a second venter; and having devised other parts of his estate to several others of his children, he then deviseth, "That all the rest and residue of his goods, chattels, lands and tenements not particularly and expressly disposed of by his said will, should be sold by executors for payment of his debts and legacies, and the overplus to be divided amongst his younger children."

And the only question was, whether the lands in question being devised to the eldest son by the second venter, which carried an estate for life only, the reversion of them should pass to the executors by virtue of the devise "of all the rest and residue of his lands and tenements not particularly and expressly disposed?"

It was agreed, in case he had devised all the rest and residue of his estate, that the reversion would have passed without question; but those lands being devised before, though but for life only, the question was, whether they should pass by virtue of these words?

This cause being heard by my *Lord Keeper*, he referred it to the Judges of the Common Pleas to certify their opinions; and they, having heard counsel on both sides, certified their opinions thus:

*May it please your Lordship,*

In pursuance of your Lordship's order we have heard counsel on both sides upon this case, referred to us by your Lordship for our opinions therein; and upon

consideration thereof we are of opinion, that the reversion and inheritance of the lands in question (which was devised to the defendant for life) is given to the executors.

*Tho. Trevor, Jo. Blencow,  
Ed. Nevil, R. Tracy.*

The authorities cited in this case by me, of counsel with the defendant, were *Wheeler* and *Walnore*, Allen, 28. 18 Car. 1. *Cooke v. Gerrard*, 1 Lev. 212. *Willows v. Lydcott*, 2 Vent. 285. 1 W. & M. (a).

(a) *Chester v. Chester*, 3 P. Will. 55-6. 600. *Doe v. Weatherby*, 11 East, 322. *Freeman v. Duke of Chandos*, Cowp. *Goodtitle v. Meredith*, 2 Maul. & Sel. 363. *Atkyns v. Atkyns*, *Ibid.* 808. *Roe* 5. *Doe v. Brazier*, 5 Barn. & Ald. 64. *v. Avis*, 4 Term Rep. 605. *Goodright* and 6 Cruise Dig. p. 244-251, 2d edit. *v. Marquis of Downshire*, 2 Bos. & Pull.

## DE TERM. S. HIL: 1704.

[ 520 ]

IN BANCO REGIS.

## WANGFORD v. WANGFORD.

( C. 695. )

S. C. 1 Salk. 299. 3 Salk. 162. 11 Mod. 38. Holt, 311.

Feb. 5, 1704.

THE obligee made the obligor executor, who administered the personal estate, but never proved the will, but died, and made the defendant his executor (b). The plaintiff took administration *cum testamento annexo* of the obligee, and sued the bond against the defendant; and this matter appearing by the special pleading upon a demurrer, the case was argued several times, and this day judgment given by all the four Judges, who delivered their opinions *seriatim*.

Where an obligee makes the obligor his executor, who administers but never proves, the bond debt is extinguished; unless there be a defect of assets for payment of creditors (a).

The main point was, whether the obligee, by making the obligor executor, had released or extinguished the debt: and they all agreed, that it had to all intents and purposes, unless there were a defect of assets for payment of debts; and if there were, they agreed that the debt should subsist for the benefit of creditors, rather than they should be defraud-

Probate is not necessary to make a complete executor, except where he must

(a) The debt is released, though the executor never administers, if he do not absolutely refuse; Went. Executors, p. 31-2, ed. 1763. 1 Salk. 300-2. 2 Black. Comm. 512. That the debt is assets for the payment, not only of creditors, but also of legatees, if such an intention can be inferred from the will, see *Flud v. Rymsey*, Yelv. 160. *Selwin v. Brown*, 4 Bro. P. C. 179. S. C. Ca. temp. Talbot, 240. Bac. Ab. Executors, (A). 10; and see Wentw. Ex. p. 31. That equity will even consider the executor to be a trustee for the next of kin to the amount of the debt, see *Carey v. Goodinge*, 3 Bro. Ch. Rep. 110. When the debtor

is made executor, it has been said to be in the nature of a specific bequest or legacy of the debt to him; *Per Powell, J.* in the above case, 1 Salk. 303; and see Butler's note to Co. Lit. 264, b. n. 1. But Lord Holt differed in this respect from Powell, and attributed the extinction of the debt to a different principle; see 1 Salk. 306. 11 Mod. 41. See further Com. Dig. Administration, B. 5. Bac. Ab. Executors, (A). 10. Wentworth. *ubi supra*. *Woodward v. Darcy*, Plowd. 186. *Gage v. Acton*, ante, p. 513.

(b) The defendant was sued as son and heir of the obligor, according to the other reports.

make *profert* of it (c).

The executor of an executor is not executor to the first testator, unless the first executor have

[ \* 521 ] proved (d).

Executor of an executor may prove as to his testator, and renounce as to the first testator. *Per Holt, C. J.*

ed. And although the executor had not proved the will, yet he was a complete executor to all intents, except bringing of actions; and he might bring actions also, so as he got the probate time enough to produce when he declared.

But he having not proved the will, his executor was not executor to the first testator, as he would have been in case the will had been proved; 2 Cro. 614. But unless the \* will be proved by the executor, the Spiritual Court takes no notice of his executor, but grants administration *cum testamento annexo* to the next of kin to the first testator (e). And it was said by the Chief Justice, that in case the executor doth prove the will, yet his executor may have his election, whether he will be executor to the first testator; for he may renounce that, though he proves the will of his testator, according to 2 Cro. 614. *Jud' pro def'*.

*Sed semble q' iste livre ne warrant cest point, q' in le case in Cro. le volunt ne fuit prove per le executor.*

(c) *Abraham v. Conyngham*, ante, p. 446. *Duncombe v. Walter*, post, p. 539. 2 Fonb. Treat. of Eq. B. 4, P. 2, c. 1, § 2.

(d) For the second executor (not being named in the will) cannot prove it: but if the original executor have proved

it, no further probate of it is necessary.

(e) Powell, J. said, that the spiritual courts have sometimes granted administrations *de bonis non administratis* by the executor, where the effects of the testator have been administered by him without probate. 1 Salk. 304.

## DE TERM. S. TRIN. 1675.

IN BANCO REGIS.

### INDICTMENTS.—PRESENTMENTS.

( C. 696. ) THE CASE OF THE PARISH OF ST. ANDREW'S, HOLBORN.

S. C. 1 Vent. 256. 1 Mod. 112. 3 Keb. 301. 3 Salk. 183.

A parish indicted for non-repair of highways cannot, under a plea of *not guilty*, shew that another parish, person, or precinct is bound to repair.

[ \* 522 ] Indictment of a particular precinct or person

It was said in this case by *Hale*, that the parish of common right ought to repair their highways; and if they be indicted, and plead not guilty, they cannot give in evidence, that another parish or person, or part of that parish, ought to repair it, nor any thing else, but that it is in repair; for the not guilty goes only to that.

And if another ought to repair, it should be pleaded specially (a).

\* But if a particular precinct of a parish, or a particular person, be indicted for repair of a highway, it must be said

(a) See *R. v. City of Norwich*, 1 Stra. 177, 183-4. *R. v. Sheffield*, 2 Term Rep. 111. *R. v. Bucks*, 12 East, 192. *R. v. Northampton*, 2 Maul. & Selw.

262. *R. v. St. George, Hanover Square*, 3 Campb. 222. *R. v. St. Giles*, 5 Maul. & Selw. 260, and the notes to *R. v. Stoughton*, 2 Saund. 159.b. &c.



in the indictment how they came to be chargeable, viz. either by prescription or *ratione tenuræ*. [Style, 163, 364, 109; 400.] (b).

(b) *R. v. Broughton*, 5 Burr. 2700. *R. v. Kingsmoor*, 2 Barn. & Cressw. 190. *R. v. Sheffield*, cited in the last note. *S. C.* 3 Dow. & Ry. 398.

for non-repair must shew a liability by prescription or tenure.

( C. 697. )

A JUDGMENT in a forcible entry was reversed, because it was alleged, that the party entered into the house *existen' liberum tenementum* J. S. and doth not say *tunc existen'*; and without the addition of *tunc* it relates to the time of the indictment, and not to the time of the entry. 2 Cro. 214. 2 Rol. Rep. 246 (a).

An indictment for a forcible entry into a freehold must say "then being the freehold of" &c.

(a) *R. v. Moor*, ante, p. 444. *R. v. Show*, 272. *R. v. Ward*, 2 Ld. Ray. Serjeant, 1 Vent. 23. *R. v. Hayes*, 1 1467-8. 1 Hawk. c. 64, s. 38.

(C. 697 b.)

AN indictment was moved to be quashed, because he says it was *per juratores*, and doth not name them nor tell the number of them; and doth not say that they were *liberi et legales homines*; and yet held good enough.

Naming jurors in an indictment.

Not naming of the jurors is a good exception (a).

(a) 2 Hale H. P. C. 167. 2 Hawk. 1 Saund. 248, note (1). *R. v. Atkinson*, c. 25, s. 16, 17, 126. *Faulkner's case*, 4 East, 175, n. (b).

### SIR ROBERT VINER'S CASE.

*S. C.* ante, p. 389, 401.

( C. 698. )

It was held by *Hale* in the case of Sir *Robert Viner*, concerning the marriage of his daughter to Emerton, that an indictment would lie against a man for a false return upon a *habeas corpus*.

An indictment lies for a false return to *hab. corpus*.

*Semb. S. C. R. v. Parker*, 2 Lev. 140. 3 Keb. 489.

(C. 698 b.)

AN inquisition of a *felo de se* for drowning himself was quashed, because there was *emersit* instead of *immersit*.

Inquisition quashed for saying "se emersit."

### KING v. PHILPOTT.

*S. C.* 3 Keb. 623, 641.

( C. 699. )

A MAN was indicted in Ireland for speaking scandalous words of the mayor, and was found guilty and fined; and being taken in execution, he brought a writ of error. And the question was, whether he should be admitted to assign his error by attorney, or must be forced to come in person? And after a long debate, the king's attorney offering to assent

Whether error on a conviction for scandalous words can be assigned by attorney? 2 Cro. 616. Style, 297.

that he should assign his errors by attorney, a special rule was drawn to that purpose (a).

(a) As to appearing by attorney in criminal cases, see *Bacon's case*, 1 Lev. 146. 2 Hale H. P. C. 216. *R. v. Tappner*, 2 Ld. Ray. 1284. *R. v. Wilkes*, 4 Burr. 2540-1. *Viner, Attorney, F.*

Com. Dig. Attorney, B. 4, 5, 6. Bac. Ab. same title, (B). 3 Black. Comm. 25. As to reversing outlawries by attorney, see 4 & 5 Will. & Mary, ch. 18.

### (C. 699b.)

Indictment at sessions quashed for not mentioning the county.

INDICTMENT quashed, because it is said "at the sessions," &c., and doth not say "for the county." Cro. Eliz. 490. Style, 448. [2 Hale, 166].

[ 523 ]

### (C. 700.)

Indictment bad for omitting time, or *contra pacem*.

Russ. & Ry. C. C. 176. 3 B. & C. 502.

INDICTMENT for stopping a way, and doth not say when; and therefore it was quashed; for it might be before the act of oblivion. Cro. Eliz. 752.

*Contra pacem omitt fait Indictment vicious.*

Party subject to an indictment *per stat.* Ante, Case 509.

### (C. 701.)

#### LOCK'S CASE.

Indictment for forcible entry quashed for want of *manu forti*.

INDICTMENT of forcible entry quashed for want of *Manu forti*. Style, 135. *Enter le Roy et Lock, ex mea motione, Term. Pasch. 1676. Vide Cro. Eliz. 461 (a).*

(a) *Baude's case*, Cro. Jac. 41. *R. v. Bathurst*, Sayer Rep. 225. *R. v. Storr*, 3 Burr. 1698. *R. v. Bake*, *Ibid.* 1731. *R. v. Wilson*, 8 Term Rep. 357.

## DE TERM. S. TRIN. 1676.

### IN BANCO REGIS.

### (C. 702.)

*Vi et armis* unnecessary in indictments for cheating.

*VI et armis* not necessary in an indictment for cheating with false dice. *Per Twisden (a).*

(a) Acc. *Spencer & Amy v. Huson*, 1 Keb. 652. *R. v. Burks*, 7 Term Rep. 4. 2 Hawk. c. 25, s. 90. *Quære*, whether those words are in any case neces-

sary, since stat. 37 Hen. 8, ch. 8? See *R. v. Burridge*, 3 P. Will. 498. 2 Hawk. c. 25, s. 90-1.

### (C. 702 b.)

*Semb. S. C. R. v. Brown*, 3 Keb. 651. 1 Vent. 296.

No indictment for perjury by wager of law or swearing a foreign plea.

AN indictment doth not lie for perjury by wager of law, nor by swearing a foreign plea; and an indictment was quashed for it (a).

(a) The report of Keble adds, that perjury in an answer in Chancery is not indictable. But see 3 Inst. 166. 5 Mod. 348, that such perjury is an of-

force at common law: and in *Miller's* case, Noy, 128, (recognized in Com. Dig. Justices of Peace, B. 102,) perjury in a man's own cause, as *wager of law*, &c. was held indictable at common law, though not by the stat. 5 Eliz. c. 9.

Perhaps these cases may, therefore, be reconciled by supposing that the language of the court in the above case of *R. v. Brown* has reference only to an indictment founded upon the statute.

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( C. 703. )

**PRESENTMENT** in a court-leet for using false weights was quashed, because it did not say, that they were used in trade.

Presentment in a leet for false weights, must shew they were used in trade and within the jurisdiction.

2. It doth not set forth that they were used within the jurisdiction of the court.

**KING v. JOHNSON.**

( C. 704. )

**INDICTMENT** for a forcible entry into a house that he was possessed of *pro termino adhuc venturo*, and doth not say *pro termino annorum*, which it ought to be, or else to say, *in libero tenemento*; for else his term may be but for a day or an hour: it was quashed. 2 Roll. 80 (a).

Indictment for a forcible entry into A.'s house, whereof he was possessed "*pro termino adhuc venturo*" bad.

(a) *S.P. 1 Vent. 306, and semb. S. C.*

(C. 704 b.)

**INDICTMENT** against a constable for not executing warrants quashed, because it was not averred, that the party was constable at the time of the warrants delivered.

**KING v. LEDGER.**

( C. 705. )

**JUDGMENT** in an indictment reversed, because it was *Ideo consideratum est quod committatur ad gaolam*, whereas it ought to be *Ideo forisfaciat*; for this is an award of execution: the indictment was for using a trade not being an apprenticeship.

**BROWNE'S CASE.**

( C. 706. )

*S. C. ante, p. 456.*

**IN** an indictment or information for a libel it is not necessary to set it forth *in hæc verba*.

**DE TERM. S. TRIN. 1681.**

[ 525 ]

**IN BANCO REGIS.**

( C. 707. )

It was moved by Mr. Williams to quash an indictment for erecting a cottage taken in a court-leet, because in the return the style of the court was *Curia visus Fra. Plegii cum Curia Baron'*, &c. (a). And he objected, that the court-

A court-baron and leet may be held together, and the acts done therein

(a) See Com. Dig. Copyhold, R. 8.

shall be referred to the proper court.  
*Ante*, p. 473.

baron had nothing to do with this matter. And it was answered by Ch. Just. *Pemberton*, that many of these courts are so held together, and it shall be taken respectively, viz. what is done relating to a court-baron shall be intended to be done in it as a court-baron; and so for what relates to it as a court-leet (*b*).

(*b*) *Watk. Gilb. Ten.* 432-3. Note *lxxxviii.* and *lxxxix. R. v. Everard*, 1 *Ld. Ray.* 638. *S. C.* 1 *Salk.* 195. *Sed vide cont. R. v. Ayers*, 2 *Keb.* 139. But where there are several commis-

sions or courts which have jurisdiction over the same matter, and their manner of proceeding is different, it ought to appear by which of them the indictment is taken. *R. v. Everard, supra.*

## OUTLAWRIES REVERSED.

( C. 708. )

Bad return to an *exigent* against two.

EXIGENT against two, and the sheriff returned, *quod non comparuerunt*, and doth not say *nec aliquis eorum*; and reversed *Mich. Term.* 1675; and so it was held in *Trin. Term.* 1676. *Vide* 2 *Rol.* 802. 2 *Rol. Rep.* 400.

( C. 709. )

Return to *exigent* must shew that the court was held at a place in the county.

THE KING *v.* MASON,—*Mich.* 1680.

THE outlawry reversed, because in the return of the exigent, the sheriff returned *Exigi feci ad comitatum meum tent' pro comitat' prædict' apud Paynswick*, and it doth not appear that *Paynswick* is in the county; and for that cause it was reversed.

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## DE TERM. S. TRIN. 1676.

IN BANCO REGIS.

## ARBITRAMENTS.

( C. 710. )

HINTON *v.* BRAINE.

*S. C. Hinton v. Crane*, 3 *Keb.* 675.

When a defendant pleads *no award*, he is estopped from taking any exception which supposes an award made (*a*). Payment before the day is payment at the day appointed.

DEBT upon a bond to perform an award; upon *Nullum arbitrium* pleaded, and the condition being, that if the two arbitrators did not make an award on or before the tenth day of November, then if the umpire did make it on or before the 17th day of November.

The plaintiff replies, and shews that the arbitrators made no award on the 17th day of November, but the umpire did

(*a*) See *Aylard v. Nicholls*, *ante*, p. 266, and note *ibid.* 1 *Saund.* 103, n. (1). and *ibid.* 327, n. (1).

award, that the defendant should pay 10*l.* at or before such a day; and he avers, that he did not pay him upon the day.

Two objections were made: 1. It doth not appear, that the umpire had any power; for although they made no award the 17th day, yet they might the tenth day, or before. But to that the Court answered, that if it were made before, then it was made upon the 17th day; but here the defendant having said, they made none in his bar, shall not now come and suppose that they made any.

2. He avers, that the defendant did not pay him at the day, but it may be he might before the day. *Per Curiam*, payment before the day is payment at the day; and so it is always ruled in evidence upon *Solvit ad diem* (b). *Jud' pro quer'*.

(b) See the cases collected in 12 Vin. Bull. N. P. 162. *Dyke v. Sweeting*, 241-2. *Merril v. Josselyn*, 10 Mod. Willes, 585. *Fletcher v. Hennington*, 147. *Jernegan v. Harrison*, 1 Stran. 2 Burr. 944. 317. *Tryon v. Carter*, 2 Stran. 994.

## DE TERM. S. TRIN. 1680.

[ 527 ]

IN COMMUNI BANCO.

## TWINNING v. STEPHENS.

( C. 711. )

REPLEVIN. The defendant justifies damage feasant; the plaintiff replies, that after the impounding he tendered amends, viz. 5*s.* and the defendant demurs, and judgment was given without argument for the defendant; for tender after impounding is too late; and this is not within the statute of 21 Jac. of tender before action brought, for that is in actions *quare clausum fregit*, and not in replevin. *Vide* 5 Co. *Pillington's case*. 1 Roll. 351. Het. 16, 165 (a).

Tender after impounding is too late. Tender of amends before action is not pleadable in replevin.

(a) *Vid. Ayre v. Rushton*, ante, p. 339.

## BLACKMORE v. CUMBERFORD.

( C. 712. )

THE parsonage of S. ——— in the time of H. 8, was appropriated to the Bishop of Chester: In 5 Ed. 6, (living the incumbent of the parsonage) the bishop, reciting the appropriation and the life of the incumbent, makes a lease of the parsonage for 99 years, which lease was confirmed by the dean and chapter; the lessee assigns his term; the incumbent dieth in the life of the bishop; the assignee of the lessee entered, and paid his rent to the bishop for some years, and then the bishop grants, releases, and confirms to the assignee *habendum ab expiratione termini prædicti* for a \* month, with a remainder to him and his heirs, which was confirmed by the dean and chapter.

When a parsonage is appropriated to a bishop, living the incumbent, a lease by the bishop, before the incumbent's death, is void. *Semb.* a lease by indenture can-

[ \* 528 ] not operate by estoppel, where it appears by recital that the

In this case several points were moved:

lessor has no estate.  
If the jury find a deed with a recital, this is no finding of the matter recited.  
If a disseisee receives rent of a disseisor, the disseisin is purged: *Semb. per North, C. J.*

1. Whether the lease made by the bishop, 5 Ed. 6, was a good lease, or not? And that was resolved to be a void lease, because although the appropriation was well made in the life of the incumbent, yet so long as the incumbent lived, the fee-simple of the parsonage was in him, and so the lease made in his life-time was void. Dy. 244(a).

2. Whether admitting this lease was void in respect of its operation by way of interest; yet if it should not work by way of estoppel, the bishop that made it living till the death of the incumbent, and being made by indenture? And it was urged strongly, that it should not work by way of estoppel, by reason that it appeared by the recital in it (that the incumbent was living) that it was void; for the nature of an estoppel is by concluding the party that grants to say he had no estate in him at the time of the grant; and when it appears in the lease that he had no estate, that presumption is taken away; but it was admitted, if that recital had not been in it, it might have worked by way of estoppel. 1 Co. 155.

But Serjt. *Maynard* said, that it would be a hard construction, by reason the truth is recited in the deed, that it should not be so effectual as though the truth had not appeared, or as though a falsehood had been recited. But to that point the Court seemed to incline, that it was no estoppel(b).

4 Co. 53.

If it were an estoppel, the bishop surviving the parson, they agreed that it would be turned into an interest, and would pass to the assignee.

3. *Qu.* What estate the party had when he entered by virtue of this lease?

*Maynard pro quer'*: He is tenant at sufferance, and the confirmation or release operates nothing to enlarge his estate.

Cro. Car. 388.  
1 Inst. 57.

*Croke pro def'*: He is either tenant at will, as a feoffee that enters without livery, and then the release or confirmation will operate by way of enlargement of his estate by reason of the privity:

1 Roll. 861.

[ \* 529 ]

Or else he is a disseisor, and then it will operate by extinguishment of right, and he cannot be tenant at sufferance, for that is where a man enters by a good title, and holds over; and Lit. sect. 461, where he saith, if a man \*occupy lands of his own head, he seems to be tenant at sufferance, but he doth not say where he *enters* of his own head, as my Lord Coke observes, 1 Inst. 271 a. for then he would be a disseisor.

1 Roll. 661.

And though *Maynard* insisted, that this shall not be a disseisin against the will of the bishop, and that he had an election either to take the party for a disseisor, or not:

(a) See Watson's Clerg. Law, c. 41.  
in initio. *Grendon v. Bishop of Lincoln*,  
Plowd. 499 b. Viner, Appropriation, D.

(b) Acc. Co. Lit. 352 b. Com. Dig.  
Estoppel, E. 2.



But that was denied *per North*, for it is not at the election of the party, whether it shall be a disseisin or not; but if tenant at will makes a lease, there the party hath election to take either the lessor or the lessee for the disseisor; Cro. Car. 304; but it is a disseisin (c).

It was insisted farther by *Maynard*, be this a release or confirmation, or whatever it is, the *Habendum* is *post terminum prædict. finitum*; so it cannot enure presently to enlarge the estate, for the reversion doth not pass presently, but it is a grant only in remainder.

But to that it was answered, that if the lease recited were a void lease, then the other takes effect presently. Cro. Car. 399. 1 Roll. 849.

Another question was, whether the finding a deed in which there is a recital, be a finding of the matter recited? And it was urged, that it was; as in case a jury finds a deed of bargain and sale, wherein money is mentioned to be paid, the money is found to be paid.

But the Court denied, that a matter, recited in a deed found, is found so; for then if there be a false recital in a deed, the jury will find a falsity; and yet they find nothing but truth, which would be absurd (d); and that instance of a bargain and sale is nothing; for there, though the money be never paid, yet it is a good consideration if it be mentioned in the deed.

Another question was, if it were a disseisin at first, yet whether, when the bishop receives the rent, that does not purge the disseisin, and turn it to a tenancy at will (e): And *North*, Ch. Just. said he had frequently observed it, that if a copyholder commits a forfeiture, that is a disseisin; and after the lord receives the rent, the disseisin is purged. But in this case it is all one to the defendant; for be he tenant at will, or disseisor, the release and confirmation avail him.

(c) On the doctrine of disseisins, and of disseisins at election, see *Atkyns v. Horde*, 1 Burr. 60. *S. C. Cowp.* 689. 5 Bro. P. C. 247. *William v. Thomas*, 12 East, 141. Butl. Co. Lit. 330 b. n. 1. Com. Dig. Disseisin, F. 1, 2, 3, 4. *Doe v. Lynes*, 3 Barn. & Cress. 388.

(d) See *Threadneedle v. Linum*, ante,

p. 180. *Rowe v. Huntington*, Vaugh. 66, 81. As to how far the jury are bound by estoppels, see Com. Dig. Estoppel, E. 10. *Ibid.* Plesder. S. 5. Bac. Ab. Verdict, (U). *Ibid.* Leases, (O). *Vooght v. Winch*, 2 Barn. & Ald. 671. (e) *Denn v. Fearnside*, 1 Wilson, 176.

A disseisin by wrongful entry is not a disseisin at election only. If tenant at will makes a lease, the party may elect to take either lessor or lessee for the disseisor. 9 Viner, 107. 1 Lutw. 803.

A conveyance which is limited to commence after an existing lease, takes effect presently, if that lease is void.

A deed of bargain and sale, in which money is mentioned to have been paid, is good, though in fact it was never paid. 1 Leon. 170. Moor, 570.

Ante, p. 517.

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### JONES v. CHERNEY.

( C. 718. )

A. LEASES to B. forty acres, parcel of sixty; and before B. makes his election, he dies; and the question was, whether or no this lease was not void by the death of B., or whether his executor might make his election?

And it was argued, that the election ought to be made in the life of the party; and these cases cited, Dy. 280. 2 Co. 36. Plo. 273. 1 Inst. 145.

But the Court held, that an election might be made by the

A. makes a lease for years to B. of 40 acres, parcel of 60: the election may be made by B.'s executor.

executor, and distinguished between the case of a lease for years and a feoffment; for in case of a feoffment it is void, because a livery cannot operate *in futuro*. 1 Roll. 725. Moor, 81. 5 Co. *Palmer's case*, Cro. Eliz. 819. Hob. *Stukeley v. Butler*.

## DE TERM. S. MICH. 1680.

IN COMMUNI BANCO.

( C. 714. )

SIR J. CUTLER'S CASE.

S. C. 2 Show. 140.

To say of one who is a justice of the peace, deputy lieutenant, and a  
 [ \* 531 ] candidate at a parliamentary election, that he is a *papist* and a *pensioner*, with an averment shewing that *pensioner* means one who sells his vote, held actionable.

SIR J. CUTLER brought an action, wherein he set forth, that he was a justice of peace, a deputy lieutenant, and did stand to be elected for a parliament-man at Taunton; and he did likewise set forth, that in the last parliament there were certain men that sold their suffrages \*in parliament, who were commonly known by the name of *pensioners*; that the defendant said of him these words, "Sir J. Cutler is a *papist* and a *pensioner*," *per quod* he was put to great expenses at his election; a verdict was found for the plaintiff, and 500*l.* damages were given.

Moved in arrest of judgment by *Baldwin* and *Pemberton*, that *pensioner* is not actionable, for it signifies an honourable employment at Court: and the word *papist*, it hath been adjudged, is not actionable; for a man may be a *papist*, and yet not liable to any punishment, for many of them do take the oaths. Godb. 147. Brownl. 166. 2 Roll. 56.

But three of the Judges inclined, that since the statute of 3 Jac., that makes it treason to be reconciled to the pope, the words were actionable; and *North* said, that to call a man *papist* now to him seemed to be all one as to call him *traitor*, for they do all endeavour to advance the pope's supremacy over the king's (a).

(a) See *Sir T. Clarges v. Rowe*, ante, p. 280. 1 Viner, 403.

( C. 715. )

BARBER v. VINCENT.

*Indebitatus assumpsit* for a horse sold; plea, infancy; replication, that it was sold to carry the defendant about on necessary business; demurrer: held, that the demur-

INDEBITATUS *assumpsit* for a horse sold for 20*l.* The defendant pleaded *deins age*.

The plaintiff replied, that he sold him the horse for his conveniency to carry him about his necessary affairs; to which the defendant demurred.

And the sole question was, whether an action would lie against an infant for money for a horse sold? It was urged on the defendant's part, that an infant was chargeable only

for necessaries, as meat, drink, clothes, lodging, and education. Cro. Eliz. 175. Cro. Car. *Ayliff v. Archbold*. Latch. 169.

But the Court were of a contrary opinion; for the plaintiff having averred, that he sold him the horse to ride about upon his necessary occasions, and the defendant having confessed it by his demurrer, it must now be taken to be so: if the defendant had traversed, then the jury must have judged of it, whether it were necessary or convenient, or not? and so likewise of the price of the horse, whether it were excessive, or not? *Jud' pro quer' nisi* (a).

(a) As to what shall be deemed necessaries, see the older cases in Com. Dig. Infant, B. 5. Bac. Ab. Infancy, (I). Viner, Infant, G. 2, and the later cases of *Turner v. Trisby*, 1 Stra. 168. *Clowes v. Brooks*, 2 *Ibid.* 1101. S. C. 9 Viner, 392. *Evelyn v. Chichester*, 3 Burr. 1717. *Hands v. Slaney*, 8 Term Rep. 578. *Ford v. Fothergill*, 1 Espin.

211. S. C. Peake, N. P. 301, and note *ibid.* in 3d edit. *Clarke v. Leslie* 5 Espin. 28. *Coates v. Wilson*, *Ibid.* 152. *Berolles v. Ramsay*, Holt, N. P. 77, and note *ibid.* *Maddox v. Miller*, 1 Maul. & Selw. 738, in which last case the question was considered to be a mixed one of law and fact.

rer admits the necessity, and that judgment must be for plaintiff. 1 Roll. 729.

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### WEDGWOOD v. BAYLY.

S. C. T. Ray. 463. 2 Show. 177. Skin. 39.

TROVER for coals by two, and one died *apres jour in bank, et devant verdict*: the question was, whether the action should abate by the death of one of the plaintiffs?

*G. Stroud* argue *q' ny*, and he cited 2 Ric. 3, 1. Dy. 175. 48 Ed 3, 36. 7 Co. *Hall's* case, 1 Inst. 198. 9 Co. *Read v. Redman*.

Whether an action of trover abates by the death of one of the plaintiffs after the day in bank, and before verdict. 2 Bulst. 262. 3 Mod. 249.

*Pemberton* *à contra*, that the writ shall abate; and he took a difference between original and judicial writs, and writs that go in discharge, as writs of error, *audita querela*, *quid juris clamat*. 17 E. 3, 11. Dy. 279.

*Curia*:—The plaintiff shall have judgment, and let the defendant, if he please, bring a writ of error (a).

(a) The judgment was reversed on error in B. R.; see the other reports. In Shower's report the following remark occurs: "Chancery hath been, and still is endeavouring to destroy survivorship, and it was the attempt of the

commissioners in the late times." p. 178. See the note by Serjeant Williams in 2 Saund. 72 i; and stat. 8 & 9 Will. 3, c. 11, altering the law in this respect.

( C. 717. )

AN action was brought against an administrator upon his promise to pay a debt of the intestate, in consideration of forbearance.

Promise by administrator to pay debt of intestate upon forbearance must be in writing.

The promise not being made in writing, so was adjudged void, and expressly within the statute of frauds and perjuries (a).

(a) *Rann v. Hughes*, 7 Term Rep. 850, note (a).

( C. 718. )

MARSHALL v. HALL.

In debt on  
stat. of gaming,  
miscasting the  
treble value is  
aided by verdict.

DEBT upon the statute of gaming, and demands the treble value of what was lost, viz. 233*l.* 13*s.* 4*d.* lost, and demands 700*l.* which is less by 20*s.* than it comes to; and it was moved in arrest of judgment; but *per Cur.* This is helped by the verdict, but it might have been fatal upon a demurrer (a).

(a) See the cases in 15 Viner, title Miscasting.

( C. 719. )

MARSHALL v. JENNISON.

In debt on  
bond, the de-  
fendant may  
plead an accord  
[ \* 533 ]  
and satisfaction  
by delivering up  
to plaintiff a  
bond in which  
plaintiff was  
bound to him.

DEBT upon a bond of 100*l.* The defendant pleaded, that he delivered up to the plaintiff a bond, wherein the plaintiff was bound to him, which he accepted in satisfaction of the said bond. Resolved *per Cur.*, this is a \* good plea, for although the giving of one bond is not a good satisfaction for another, yet this is tantamount to a payment when the defendant discharges such a debt due to him from the plaintiff, and so differs from the case, Hob. 68. Cro. Eliz. 86. Sty. 263 (a).

(a) See *Lobly v. Gildart*, 3 Lev. 55.  
*Blythe v. Hill*, 1 Mod. 221, 225. 2 *Ibid.*  
136. *Geang v. Swaine*, 1 Lutw. 466.  
Com. Dig. Condition, L. 2, 3. 5 Viner,

287. *Roades v. Barnes*, 1 Burr. 9. *Stur-*  
*dy v. Arnaud*, 3 Term Rep. 599. *Cum-*  
*ber v. Wane*, 1 Stra. 426. *Scott v. Sur-*  
*man*, Willes, 406.

## DE TERM. S. HIL. 1680.

IN COMMUNI BANCO.

( C. 720. )

WATSON v. HARRISON.

Whether exe-  
cutor *de son tort*  
can justify a  
retainer for his  
own debt, by  
taking adminis-  
tration *pendente*  
*litte.*

AN action was brought against one as executor *de son tort*; after the action brought he takes out letters of administration, and pleads a debt due to him from the intestate, and so justifies to retain in satisfaction of his own debt. The question was, whether his taking of administration after the action brought, shall so purge the wrong that now he may justify detainer like legal administrator? The cases cited were 1 Roll. 923. 5 Co. *Coulter's case*. 12 H. 4, 22. 21 H. 6, 8. Cro. Car. *Porter and Whitmore*; *Poramer's case*, Plowden (a).

(a) See *Whitehead v. Sampson*, *ante*, p. 265, and note *ibid.*

DE TERM. PASCHÆ, 1681.

IN COMMUNI BANCO.

DENTON v. WILSON.

(C. 721.)

**DEBT** upon the statute of 5 Eliz. for exercising the trade of a baker.

It was moved in arrest of judgment by *Baldwin*, that the action ought to be brought in the proper county, either before the justices of peace, or the justices of *oyer and terminer*; and resolved *per Cur'*, that such actions that do not lie before justices in the county may be brought here; for the design of those statutes was not so much that actions should be begun in the county, as that they should be tried there. *Vide*, Style's Rep. *Ash v. Naylor*, and *Hughes v. Barnes* (1). (a).

Actions upon penal statutes, which do not lie before justices in the county where the offence was committed, may be brought in the courts at Westminster.

(1) S. C. 1 Vent. 8.

(a) See *Carter's case*, ante, p. 64. *Nicholls v. Cotterell*, p. 377, and the notes to *R. v. Kilderby*, 1 Saund. 312.

SCETCHET v. ELTHAM.

(C. 722.)

**TRESPASS** *quare vi et armis clausum fregit et equum suum custodivit tam negligenter ut equus fregit clausum et momoravit equas querentis, per quod* they were spoiled and died; verdict *pro querente*, and judgment *fuit stay quia ne dit scienter custodivit equum*. [4 Co. 18.] (a).

Declaration for keeping defendant's horse so negligently that it broke plaintiff's close and bit his mares, must allege a *scienter*.

(a) As to the materiality of the *scienter*, see ante, p. 431. *Quære* the accuracy of the report in representing the form of action to have been trespass *quare clausum fregit*.? Supposing the action to have been trespass *on the case*, and the loss of the plaintiff's mares to have been the substantial injury complained

of, it may then indeed have been held necessary to allege a knowledge of the horse's propensity to bite. See *Mason v. Keeling*, 1 Ld. Raym. 606. S. C. 12 Mod. 332. *R. v. Huggins*, 2 Ld. Raym. 1533. *Buxendin v. Sharp*, 2 Salk. 662.

CLARKE v. BOSSE.

(C. 723.)

**RESOLVED** *per Cur'*, that the lessor as well as the lessee in ejectment may have an action for the mesne profits, \* but with this difference, that the defendant may defend his title against the lessor, but he cannot against the lessee, because he is estopped: *nota q' jeo avoy view ceo frequenter affirmo* (a).

Either lessor or lessee in ejectment may sue for mesne profits; and defendant is estopped to defend his title

(a) Acc. 1 Lill. Prac. Reg. 676. The recovery in ejectment is now considered to be equally conclusive in both cases, unless the plaintiff seeks to reco-

ver profits accruing at a period antecedent to the demise stated in the declaration in ejectment. *Aslin v. Parkin*, 2 Burr. 665. Bull. Ni. Pri. 87.

against the latter.

## DE TERM. S. TRIN. 1681.

IN COMMUNI BANCO.

( C. 724. )

In *quare imp.* for simony, the patron needs not be joined.

For simony: the defendant pleaded in abatement, that the patron was not made party: resolved, that he need not, and so the plea was overruled, and a *respondeas ouster* awarded. Hob. 320. 5 H. 7, 35. 2 H. 6, 25. 13 H. 8, 14. Hob. 216, (317). 3 H. 4, 2. 22 Ed. 4, 44. 40 Ed. 3, 7. 18 Ed. 3, 20 (a).

(a) Probably the *S. C.* as *R. v. Archbishop of York & Sowton*, 3 Lev. 12. 2 Show. 167; and see *R. v. Piget*, 3

Lev. 206. *R. v. Gibson*, 2 Lutw. 1086-9. Watson's Clerg. Law, c. 24, 1 vol. p. 460, 2d edit.

( C. 725. )

ROBSON v. DOUGLAS ET AL'.

*S. C. Dobson v. Douglas*, 3 Lev. 20.

Defendant avows for rent-charge as bailiff to A.: a plea in bar that avowant took the distress without the privity of A., and that A. having notice, disavowed it, is bad. Plaintiff ought to traverse [ \*536 ] that defendant was bailiff (b). *Semb.* Bailiff of a manor, as such, may distrain upon the tenants for rent-service without a particular command: *aliter*, of a rent-charge (c). Bailiff cannot distrain for amercements without a war-

THE defendant avows for a rent charge granted to Edward Arrington, and that he, as bailiff to Ed. Arrington, took the distress.

The plaintiff replied, that the defendant took the distress without the consent or privity of the said Ed. Arrington, and that as soon as the said Ed. Arrington had notice, he did disown and disavow it.

And the question was, whether this was a good plea in bar of the avowry (a)?

It was argued *pur le avowant*, that this was an ill plea, for he ought to have traversed his being bailiff, and cited \* 7 Ed. 4, 2. Cro. Car. 586. 15 H. 7, 17. He need not shew how he was bailiff, but it is good enough to allege generally that he was bailiff: 33 H. 6, 3. 1 Roll. Rep. 46. Cro. Eliz. 256: in which last books it is said, that bailiff, or not bailiff, is not traversable.

— *pro quer.* argued, that this is a good plea, because if a bailiff do distrain without the privity or consent of his master, he shall not justify. A bailiff of a manor ought to have a warrant from the steward before he can distrain for amercements in a court-leet. 1 Leon. 50. Moor, 573. And he said in this case the plaintiff might be twice charged, if

(a) The question arose on general demurrer to the plea in bar. Levinz Rep.

(b) *Earl of Bedford's case*, Cro. El. 14. *Trevilian v. Pyne*, 1 Salk. 107. *Britton v. Cole*, 1 Ld. Ray. 310. *Redding v. Lion*, *ibid.* 405. *Goudier's case*, 12 Mod. 321. Buller's Ni. Pri. 55. 1 Saund. 347 d. note (4), by Serjeant Williams. Com. Dig. Pleader, 3 K. 14.

(c) The bailiff seems to have an official authority to do ordinary acts respecting the lands within the manor,

which are beneficial to the lord, or which are necessary for the improvement and maintenance of the estate. But acts which may prejudice him, or which are unconnected with the manor, are without the limits of his authority, and therefore not binding on the lord without his special concurrence. See (besides the principal case) Bro. Trespas, pl. 288. *Brediman's case*, 6 Co. 59 b. *Gybson v. Searl*, Cro. Jac. 176-8. *Colt v. Bishop of Coventry*, Hob. 154-5. Viner, Bailiff, C.



this avowry should be good, because this cannot be pleaded in bar to Ed. Arrington, in case he should distrain again. rant from the steward (d).

*North*, Ch. Just. That the plea is ill; for when a man hath a bailiff, that bailiff is supposed to have an authority to distrain for rents, without any particular command and consent; and it would be hard for the bailiff, in case it should be in the power of the lord afterwards to make him liable to pay damages by disavowing the fact; and he agreed, and so did the other three Judges, that a bailiff of a manor could not distrain for amerciaments without a warrant from the steward, no more than a bailiff can arrest a man upon a writ without a warrant from the sheriff; but those cases differ from this, because those are in the nature of processes from the Courts.

*Wyndham* took a difference between a distress for a rent-service, and a rent-charge; for, for rents-service, viz. the rents of lessees for years and copyholders, a bailiff, *quatenus* bailiff, may distrain without particular command; but this is in case of a rent-charge, which doth not belong to any manor, but is a thing in gross. 1 Bulst. 189, *Holmes's* case.

*Charlton*: When it is pleaded that he was bailiff, it shall be intended bailiff as to distrain for this rent: for though a rent-charge cannot be distrained for by him as bailiff of the manor, yet a bailiff may be made to distrain for a rent-charge, and such a bailiff this shall be intended; and he was clear of opinion, that he ought to have traversed his being bailiff.

*Levinz*: That the plea was good, and took the difference between a rent-service and a rent-charge, and said, that this being a rent-charge, here ought to have been a special precept. 17 H. 7, 10.

\* *North* said, that a bailiff may be made by word of mouth (e). [ \* 537 ]

*North* and *Charlton* were clear, that his being bailiff ought to be traversed, and *Wyndham* inclined with them, but *Levinz* *è contra*. Bailiff may be made by word of mouth. Per *North*, C. J.

At last it was agreed, that the plaintiff should mend his bar, and pay costs, and traverse his being bailiff.

(d) Acc. *Matthews v. Cary*, 3 Mod. 137. S. C. Carth. 75. *Lamb v. Mills*, Skin. 587. S. C. 4 Mod. 377. Com. Dig. Leet, O. 10. *Ritson's Bailiff of Liberty*, p. 22-3. (e) See *Carey v. Matthews*, 1 Salk. 191. *Viner, Bailiff, B. Ritson's Bailiff of Liberty*, p. 17.

### GILBERT v. DEE.

( C. 726. )

DEBT was brought upon a bond against the defendant as administrator.

The defendant pleaded ten several judgments, and that he had not assets *ultra* to satisfy those judgments.

When an executor pleads several unsatisfied judgments, the plaintiff, in

his replication,  
may object fraud  
to one or any  
number of them.

The plaintiff replied particularly to three of those judgments, that they were gotten and kept a foot by fraud.

The defendant demurred, and shewed for cause, that the replication was double; for if he had replied to any one of the judgments, and avoided it by fraud or otherwise, the whole plea had been naught, and therefore it was needless to plead to the rest; and,

It was held by the Court, that if an executor or administrator plead several judgments, and the plaintiff reply to any one of them, that it is kept on foot by fraud, &c. this is a good plea, and he need not answer the rest; and so it was held in Serj. *Sympton's* (1) case in the King's Bench; for if this plea be upon issue joined found for the plaintiff, the defendant shall pay him his whole debt.

(1) *Semb. S. C.*  
*ante*, p. 102, 121.

But the Court held likewise, that the plaintiff may reply to as many of them as he pleaseth, and if any one of them be found to be by fraud, the plaintiff shall recover.

But they all said, that this doth come within the general rule of double pleading, because pleading to any one of them is good to avoid the whole plea; but it being alleged and appearing that the precedents were so, it was held good; and so in *Meriel Tresham's* case, 9 Co. the plaintiff replied to all of them; and Judge *Levine* cited Alderman *Jefferys's* case against *Dee* (2) in the King's Bench, where this point was in question; and ruled, that the replication was good; and so it was held in this case. *Jud. pro quer'.*

(2) *S. C. 1 Lev.*  
281.

*Ante*, p. 157,  
C. 174.

If an action be brought upon a bond to perform covenants, the plaintiff ought to shew but one breach in the replication; but in the case at bar, the precedents having been so, it was adjudged *ut supra* (a).

(a) See *Chamberlaine v. Pickering*, p. 28, *ante*. *Warkehouse v. Symonds*, p. 102, 121. *Est v. Withers*, p. 467. *Ashton v. Sherman*, 1 *Ld. Ray.* 263. *S. C. 1 Salk.* 298, and *Hancocks v. Prowd*, 1 *Saund.* 385, and note (2); *ibid.*

[ 538 ]

( C. 727. )

### LEMAINE v. STANELEY.

*S. C. 3 Lev. 1.*

Where a deviser wrote the will with his own hand, and sealed it, but did not subscribe his name; this was held a sufficient signing within the stat. frauds. A mark is a sufficient signing. And *semb.* sealing alone is sufficient.

UPON a special verdict in ejectment the case was, Matthew Becket, being seised in fee of lands, writ his will with his own hand, and set to his seal in the presence of four witnesses, but did not subscribe his name. And the question was, whether or no this was a good will within the statute of frauds and perjuries? because by that statute it is to be signed by the deviser; and here the party not having set to his hand, it was not signed, although it was sealed, as was insisted upon; because this statute being made to prevent frauds and perjuries by assigning particular circumstances of the fact, those circumstances ought to be pursued, or else the act is eluded.

But the Court inclined strongly that it was well enough;

for though the act saith "signed," it is no matter where it is signed, whether at the top, or the side, or the bottom; and it is not necessary to write his name, for some cannot write, and there their mark is a sufficient signing; and others have their name on a stamp, and that is good enough; and here it is found, that the party writ it all with his own hand, so that there can be no intention of fraud.

And *Levinz* said, if another had writ the will, yet this sealing of it had been a good signing; but writing it with his own hand, it is clear.

The authorities cited were 2 Rol. 180, 181. Speed's History, 419 (a).

(a) The report of *Levinz*, which is probably the more correct one, mentions that the will began thus: "I, *John Stanley*, make this my last will, &c.;" and further states that *North*, *Wyndham* and *Charlton*, were of opinion that sealing was sufficient, but that *Levinz* doubted of this.

That the statute is complied with, if the deviser's name occurs in any part of a will written by himself, see *Hilton v. King*, post, p. 541. *Anon. Skin.* 227, cited 1 Doug. 242. *Morrison v. Turnour*,

18 Vesey, 183. 1 Fonbl. Tréat. of Eq. p. 193, n. (i). That a mark is enough, see *Harrison v. Harrison*, 8 Vesey, 185. *Addy v. Grix*, *Ibid.* 504. But the better opinion is that sealing is no signature within the statute: See *Lea v. Libb*, 1 Show. 69. *Warnesford v. Warnesford*, 2 Stra. 764. Bull. Ni. Pri. 263. *Smith v. Evans*, 1 Wilson, 313. *Gryle v. Gryle*, 2 Atk. 176. *Ellis v. Smith*, 1 Vesey, jun. 11. *Wright v. Wakeford*, 17 Ves. 458. S. C. 4 Taunt. 213.

## NEEDHAM v. CROKE.

( C. 728. )

If an executor states an account with a debtor, he may, if he pleaseth, afterwards sue in his own name for this debt; for the stating of the account raiseth a new debt; or he may sue as executor (a).

An executor may sue in his own name on an account stated with himself.

(a) But see contra, *Elwes v. Mocatoe*, 1 Salk. 207-8. *Bull v. Palmer*, ante, p. 424. *Cowell v. Watts*, 6 East, 405.

*Thompson v. Stent*, 1 Taunt. 322. *Possley v. Newton*, 2 Marshall, 147.

## DE TERM. S. MICH. 1681.

IN COMMUNI BANCO.

[ 539 ]

## DUNCOMBE v. WALTER.

( C. 729. )

S. C. T. Ray. 479. 3 Lev. 57. 2 Show. 253. Skin. 22, 87. 1 Vent. 370. Ante, p. 271.

AN action upon the case was brought by the plaintiff (as assignee of the commissioners of bankrupts) against the defendant Sir William Walter for 1000*l.* which he received of Staly the goldsmith after he was supposed to become a bankrupt.

An executor may arrest before probate. A party being arrested for debt is set at large on bail, but afterwards renders himself to prison [where he lies

The case: Staly was arrested the 6th of November by the executor of one of his creditors, and gave bail; the 18th of Nov. the said executor proved the will, and the 20th of Nov.

for two months];  
*quære*, whether  
 his bankruptcy  
 shall relate to  
 the first arrest  
 or to the render?

the said Staly rendered himself to prison; and this 1000*l.* in question was paid by Staly to Sir William Walter the said 18th day of November, which was the same day as the probate of the will.

Two questions. 1st, Whether the arrest made by the executor upon Staly before probate be a good arrest?

7 H. 4, 18.

Perk. sect. 482.

To that the Court were of opinion, that it was well enough, provided the executor had the probate under seal to produce at the time of the declaration; for an executor hath an interest before probate, and may give goods and release debts, and although he never proveth the will, it shall be good enough. 5 Co. 28. And a release made to him is good before probate. 1 Rol. 917, adjudged in point.

[ \* 540 ]

2d question. The said Staly giving bail at the time of the arrest, and afterwards rendering himself to prison, whether this shall have relation to make him a bankrupt \* from the time of the first arrest, or from the time of his going to prison? And of this point the Court was doubtful, upon perusal of the statute.

And as to the first point, although the whole Court were of opinion, that if an executor hath the probate of the will before he declares, that shall relate *ab initio*, so as to make the arrest good which was made before; yet whether it should be construed to relate so as to prejudice in this case Sir William Walter, who was a third person, *Charlton* and *Levinx* doubted; but *North* and *Wyndham* in both points *pro quer'*. *Sed adjournatur* (a).

(a) Judgment for the defendant, which was affirmed in B. R.; see the other reports. For a more particular statement of the case, see T. Raymond. The different reports are by no means perspicuous: It is not even clear what was the act of bankruptcy insisted upon; whether it was lying in prison for two months, or not compounding within six months. (stat. 21 J. 1, c. 19, s. 2.) *Levinx*, who was one of the judges, reports that the arrest before probate was agreed by all the Justices of C. B. to be illegal *quoad* Walter, though the probate made it good by relation between the parties to the suit; and the case is cited for this point in Com. Dig. Administration, B. 9; and see 2 Show. 524. But it may be questioned whether this was the opinion of the Court of B. R. on error; see *Skin.* 88 (where there seems to be a misprint). 11 Viner, 204, pl. 17. 2 Show. 254-5. That the probate is

solely necessary for the purpose of authenticating the will by *profert* in court, see *Wangford v. Wangford*, ante, p. 520. *Smith v. Milles*, 1 Term Rep. 480. *R. v. Netherseal*, 4 *Ibid.* 260. Nor was this point essential to the determination of the principal case; for the judgment of the Court rather proceeded upon the relation of the bankruptcy to the surrender in discharge of bail, which took place at a day subsequent to the payment to the defendant; see the reports of *Ventris*, *Skinner*, and *Showers*: and this is agreeable to more recent decisions; see *Cane v. Coleman*, 1 Salk. 109. *Tribe v. Webber*, Willes, 464. S. C. Bull. N. P. 38. *Rose v. Green*, 1 Burr. 437. S. C. Bull. N. P. 39. *Barnard v. Palmer*, 1 Camp. 509. *Stevens v. Jackson*, 4 Camp. 104. S. C. 1 Marsh, 469. 6 Taunt. 106. *Thomas v. Desanges*, 2 Barn. & Ald. 586.

## DE TERM PASCHÆ ET TRIN. 1682.

IN COMMUNI BANCO.

## ATKINS v. HUTCHINSON

( C. 730. )

TRESPASS for taking his corn. Two of the defendants justify as impropiators, the other as servants.

The plaintiff replies *de injuriâ suâ propriâ*.

*Le replication nest bone, q' defendant justifie per title. 8 Co. Croger's case (a).*

The general replication *de injuria*, &c. is bad, when the defendant justifies by title.

(a) See Com. Dig. Pleader, F. 21. *Fox v. Grundis*, ante, p. 42. *White v. Stubbs*, 2 Saund. 294, and note (1) *ibid*. *Cooper v. Monke*, Willes, p. 52. *Cockrill v. Armstrong*, Id. 99. *Jones v. Kitchen*, 1 Bos. & Pull. 76. *Longford v. Waghorn*, 7 Price, 670. *O'Brien v. Smith*, 2 Barn. & Cress. 909. S. C. 4 Dow. & Ry. 579. *Mahady v. Gallagher*, Irish Term Rep. 159. In the last case the Court observed, that "in a variety of cases such a plea to an avowry is bad, if demurred to, because it renders the issue involved and complicate, whereas the object of the law is to submit a simple and uninvolved fact to the jury. The

"disallowance of such a plea in some instances has proceeded on this principle, that such plea denied the whole matter averred, and thus the issue was multifarious; in others, because it involved matters triable by different fora, as matter of fact triable by a jury, and matter of record by the court; in others the disallowance turned on the nature of the fact alleged; but every one of those decisions relate to cases where the invalidity of the plea was brought forward for the consideration of the Court on demurrer." The defect is therefore aided by verdict.

[ 541 ]

## CULL and SEMAINE.

( C. 731. )

S. C. not S. P. 3 Lev. 66.

DEBT upon a bill; the words were "I promose to pay 100l. if the plaintiff mare such a widow." The defendant demurred for false English, viz. "promose" and "mare."

Bad English will not vitiate a bond.

*Per Curiam jud' pro quer'*, and cited cases, where a man did "bynde his ayre and executory (1);" and "sentene (1) *Ante*, p. 164. pounds" in a bond, and good enough.

## PHILPOT v. WALLET.

( C. 732. )

S. C. 3 Lev. 65. Skin. 24.

ASSUMPSIT upon mutual promises of marriage. The question was, whether it, being without writing, were not within the statute of frauds and perjuries?

A promise of marriage is within the stat. of frauds.

*Wyndham* was of opinion, that it was not within the words nor meaning of the statute; because this promise is for the marriage itself, and not made in consideration of marriage for some collateral matter.

Dissent. *Wyndham*, J.

But the other three Judges were against him, that it was within the words, the meaning, and the mischief of the statute, and as much a catching promise as any that the act intended to prevent. *Jud' pro def'* Hil. 33, 34, Car. 2, Rot. 536 (a).

(a) But see *Harrison v. Cage*, 1 Ld. Ray. 387. *Cork v. Baker*, 1 Stran. 34, contra.

( C. 733. )

HILTON v. KING.

S. C. 3 Lev. 86.

Whether a codicil, written immediately under a will of lands, but without a distinct signature, will revoke the devise?

*Ante*, p. 538.

A WILL was made of lands in writing, and signed and published; and afterwards the testator, by a codicil subscribed to the said will, revokes part of it, but did not sign the codicil. The question was, whether this was a good revocation since the statute of frauds and perjuries? And the Judges were divided in opinion; because the testator's name being subscribed to the will, was upon the top of the codicil; and if it had been writ after the codicil, it would have been good enough, *per Levinz*; for if the testator will write his name at the top, it will be as much a signing within the act, as though it were at the bottom, and there, though it were writ after, it seems to be all one; for if a man should make his will, and sign it, and afterwards should interline it, and publish it, it would not be necessary to sign it again. *Adjournatur* (a).

(a) North, C. J. and Levinz thought the revocation valid. Afterwards, on the removal of North into Chancery, Pemberton, C. J., Wyndham and Charlton were of a different opinion, and gave a rule for judgment for the plain-

tiff accordingly; but, adds Levinz, "whether any judgment be entered *quære*, for I do not remember it was moved again." S. C. cited 2 Vern. 742, *Onions v. Tyrer*; and see 1 Saund. 278 *c.f.* in the note.

[ 542 ]

DE TERM. S. MICH. 1683.

IN COMMUNI BANCO.

( C. 734. )

A will written before the statute of frauds is not within it, though the deviser died after the statute.

DICTUM fuit mihi per Mr. Ventris, *q' fuit tenus in Com' Banco per tous les justices en un trial at bar, (en le case de un Blayt)* that a will in writing written by the testator himself, and no witnesses to it, being made before the statute, although the party lived several years after the statute, was there held a good will; and was held so clear, that no special verdict was found upon it (a). But Serjeant *Pemberton* was of another opinion before he was made a Judge.

(a) Acc. *Gilmore v. Shuter*, *ante*, p. 466.

( C. 735. )

WEBB v. TEMPLE.

A devise by a tenant in common is not revoked by a partition, and fine levied to corroborate it. Partition may be made by tenants in common, though one

A MAN being tenant in common of a third part of a manor, made his will, and devised all his interest in the manor; and afterwards a partition was made, and a fine levied to corroborate the partition; and the question was, whether this fine and partition was a revocation or not? And adjudged by the opinion of the Chief Justice and *Tracy*, that it was no revocation; because here is no intent to revoke, nor any material alteration of the estate; for whereas the deviser before had a third part in the manor, after partition he hath



a third part of the manor. And it was said, where one tenant in common makes a lease for years, that he may notwithstanding make partition, and that the lessee shall hold the part allotted to him; for although a man hath made a lease for years, the lessee is subject to the right of making a partition, which remains in the lessor as well after the lease as before.

of them have  
made a lease  
for years.  
1 Sid 90.  
1 Keb. 357.

But *Blenco* was of opinion, that the making of partition was a revocation (a).

(a) In 8 Viner, 144, the following note accompanies this case: "This seems misprinted as to the year, 1683, Tracy and Blenco not being then justices: and by a MS. case of Sir Richard Temple's, Mich. 4 Ann. C. B. it seems to be *S. C.*, and held that it was not a revocation, for in every revocation there are three things required: 1st, That the devisor should expressly declare his mind that his will should be revoked. 2dly, That the estate devised ought to be altered, which is an implied revocation. 3dly, That the thing devised be altered."

Accordingly, it is now settled that a mere partition, whether by writ or agreement, is no revocation of a previous de-

vise, though followed by a fine, provided the fine be levied solely for the purpose of establishing the partition. See *Risley v. Baltinglass*, T. Ray. 240. *Luther v. Kirby*, 8 Viner, 148. *S. C.* 3 P. Will. 170, n. (B). *Swift v. Roberts*, 3 Burr. 1490. *Tickner v. Tickner*, cited in *Parsons v. Freeman*, 3 Atkins, 742. *S. C.* 1 Wilson, 308. *Goodtitle v. Otway*, 7 Term Rep. 410-7. *Kenyon v. Sutton*, cited in *Williams v. Owens*, 2 Ves. jun. 600. *Brydges v. Duchess of Chandos*, 2 Ves. jun. 429. *Knollys v. Alcock*, 5 Ves. jun. 648, and 7 *Ibid.* 564. *Harwood v. Oglander*, 6 *Ibid.* 219. *Atty. Gen. v. Vigor*, 8 *Ibid.* 281. *Maudrell v. Maudrell*, 10 *Ibid.* 256, 264. *Rawlins v. Burgis*, 2 Ves. & Beam. 386.



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- 1 Information at common law may be amended by the court. *Quere*, as to informations on penal statutes? Indictments are not amendable. 221
- 2 Plea *puis darrein* is not amendable except at the assizes. 253
- 3 If the bill on the file and imparlance be right, the issue roll, or *Ni. Pri.* record, may be amended by them, if the issue be not thereby altered. 325

## ANCIENT DEMESNE.

(See EJECTMENT, 2.)

## APPEAL.

(See COURTS, 9.)

## APPORTIONMENT.

(See COVENANT, 15.—RENT, 11 to 15.)

## APPRENTICE.

- 1 A master is not compellable to take an apprentice. 421. *Sed vid.* n. (b), *ib.*

## ARREST.

(See WARRANT, 1.)

- 1 A soldier is not privileged from arrest;

## ARREST.

- and a rescue by his fellow soldiers is a riot. 359
- 2 Executor may arrest before probate. 539
- Quere*, if such arrest be good as against strangers? 540, n. (a)

## ASSAULT AND BATTERY.

(See ACTION, 8.—AWARD, 5.—PRACTICE, 4.)

- 1 A private person may justify a battery by a *molliter manus imposuit*, to prevent the plaintiff from disturbing the burial service. 131-2
- 2 If two be fighting, any one may part them. 132
- 3 In trespass for assaulting, wounding, menacing, &c. a plea justifying in defence of possession needs not specifically answer the menacing. 136
- 4 A wounding cannot be justified in defence of property, without shewing a previous assault by plaintiff. *ib.*
- 5 Battery cannot be justified in order to maintain precedence at a funeral. 393

## ASSETS.

(See BOND, 17.—EXECUTORS.—HEIR.)

## ASSUMPSIT.

(See EXECUTORS, 19, 65.—INFANT, 4.—INFERIOR COURT, 7, 26.—OFFICE, 14.—PLEADING, 70.—TROVER, 2.)

- 1 *Indebitatus assumpsit* will not lie upon a bill of exchange against the acceptor. 14, 313
- 2 When an acceptance is evidence on a general count. 14 & n. (c)
- 3 Agreement by plaintiff not to join with his uncle in a suit commenced against him by defendant, is not a good consideration. 21
- 4 *Assumpsit* by under-sheriff to execute a writ of *elegit*, and cause certain goods to be found upon inquisition, which he had wrongfully seized under a former writ, is wholly void. 32
- 5 *Assumpsit* to do several dependant acts, whereof some are unlawful, is wholly void. 33
- 6 Promise by defendant to pay, if the plaintiff "shall make his debt appear," or "prove it," shall be intended of proof at the trial of an action. 53, 114
- 7 As to promises to pay upon proof by the extrajudicial affidavit of the plaintiff, *see* 53
- 8 Promise by defendant to marry plaintiff, in consideration that plaintiff would forbear to marry for seven years; held a good consideration. 66
- 9 Promise in consideration that plaintiff would forbear to sue &c. shall be intended a forbearance for life. *ib.* & n. (a)

## ASSUMPSIT.

- 10 *Assumpsit* lies on mutual promises of marriage. It is unnecessary for a female plaintiff to allege that she offered herself. 95
  - 11 In an *indebitatus* count, the *indebitatus* is inducement, and the *assumpsit* the ground of the action. 104
  - 12 In such a count, it is enough if the origin of the debt be alleged generally, so that it may appear to be a simple contract. *ib.*
  - 13 *Assumpsit* lies in the courts of common law for the fees of chancellors, registers, proctors, parish clerks, &c. 113, C. 134, n. (a)
  - 14 A promise to make a thing *appear* generally, shall be intended of proof upon the trial: *aliter* of a promise to make it appear to a particular person. 114
  - 15 Delivering up a bond is a good consideration. 115
  - 16 A general promise of indemnity to the vendee of goods, extends only to lawful evictions; and in an action by vendee, it is enough if the elder title appears of record, without expressly alleging it. 131
  - 17 *Assumpsit* lies on promise by defendant to pay his father's debt, in consideration that plaintiff would bring two witnesses to swear before a justice that his father had promised to pay it. 133
  - 18 In declaring on a promise, in consideration of forbearance to sue a stranger on a bond, whether it be necessary to shew that the bond was forfeited? 161
  - 19 Defendant promises to pay money in consideration of a promise by plaintiff to assign a lease: the assignment is not a condition precedent to the payment. 195
  - 20 In *indebitatus assumpsit*, it is a good plea to say that the parties accounted together, and that plaintiff discharged defendant in consideration of a promise by defendant to pay the balance. 195-6
  - 21 Account stated and balance paid, is a good plea. n. (a), 196
  - 22 So an account stated and a negotiable security given for the balance. *ib.*
  - 23 The delivery of the plaintiff's or a stranger's goods to the defendant, is a good consideration. *Aliter*, if they are goods of the defendant himself. 212
  - 24 *Semb.* *Assumpsit* lies on a special promise to pay rent; but not in an inferior court. 214 & n. (d)
  - 25 *Indebitatus assumpsit* lies for tithes sold. 234
  - 26 Defendant's mother being taxed to repair a church, was excommunicated for non-payment: *semb.* an action lies against defendant on a promise to plaintiffs; being churchwardens, that in consideration the bishop, at the instance of defendant, would absolve her mother, she would pay. 284
- In such case, a declaration by the plain-

## ASSUMPSIT.

- liffs as *late churchwardens*, is good after verdict. 285
- 27 Where a promise is made to a stranger on good consideration, he that has an interest in the promise shall sue. *ib.*
- 28 In *assumpsit* by a woman for breach of promise of marriage, it is enough to aver that she was *semper parata*, without saying *obtulit se*. 347
- 29 *Indebitatus assumpsit pro diversis rebus*, bad. 350, *sed vide* 357
- 30 *Indebitatus* lies for money due by custom of London for scavage. 439
- 31 Forbearance to sue for a debt due from a person deceased, is a good consideration for a promise by a stranger to pay it: and when the promise is general, no request is necessary. 439
- That the declaration must make it appear that some one was liable to be sued, when the promise was made, *see n. (a), ib.*
- 32 Declaration in *assumpsit*, in consideration of forbearance to sue for a debt of "20s. *et ultra*," held bad after verdict. 442
- 33 In *assumpsit* on a general promise of quiet enjoyment, the lessee needs not shew that the interruption was under a lawful title. 450, *sed vide n. (a), ib.*
- 34 *Assumpsit* lies on a promise to pay the debt of a third person within fourteen days, in consideration of an agreement by plaintiff to abate part of it. And *semb. (per North, C. J.)* the original debtor may take advantage of such agreement. 464
- 35 The defendant's father being about to fell timber to raise a portion for his daughter, the defendant, in consideration that he would forbear to do so, promised his father to pay her 1000*l.* The daughter may sue defendant on this promise. 471
- That the representatives of the father may sue, *See S. C. 472, n. (b)*
- Whether a party may sue on a contract *inter alios*, in which he has an interest; and whether the consideration in *assumpsit* must move from the plaintiff, *See references in n. (b), ib.*
- 36 On trial of title to lands or offices by *indebitatus assumpsit* for money had and received, *See n. (d), 479*

## ATTACHMENT, FOREIGN.

- 1 Foreign attachment is no bar without a recovery. 6
- 2 Pendency of attachment before writ purchased, whether pleadable in abatement. *ib. C. 4, n. (a)*
- 3 Money due by award may be attached. But not money due on judgment of a superior Court. 56
- 4 Nor a debt for which an action has been commenced in such a Court. *ib.*

## AWARD.

- 5 Nor money awarded by a rule of Court. *n. (c), ib.*
- 6 The goods of a corporation may be attached. 207
- 7 How far Chancery will support the custom of foreign attachment. 312

## ATTAINT.

- 1 No attaint in criminal cases. 5 & *n. (g)*
- 2 Writ of attaint is obsolete but not inoperative. *n. (g), ib.*

## ATTORNEY.

(*See ERROR, 28.—MAINTENANCE, 2, 3, 4.*)

- 1 Attorney committed and struck out of the roll for being *ambidexter*. 74
- 2 A letter of attorney to two, omitting the surname of one, is void. 146
- 3 To an action of *assumpsit* for attorney's fees, defendant may plead in bar the stat. 3 Jac. 1, c. 7, and that plaintiff has delivered no bill. 257
- 4 Attorney of B. R. cannot be fined for refusing to serve as a common-council-man in a corporation. 407

## AUTHORITY.

(*See LICENCE.*)

- 1 A bare authority, though made irrevocable, may be revoked. 89
- 2 An act, void from defect of authority, cannot be made good by relation. 446

## AVOWRY.

(*See REPLEVIN.*)

## AWARD.

(*See ATTACHMENT, 3, 5.—INFANT, 2.—PLEADING, 11.*)

- 1 Where an award of all matters up to a period not included in the submission, is good. 51
- 2 An award of mutual releases is good. *ib.*
- 3 An infant and one of full age (A.) join in an arbitration bond, and it is awarded that they or either of them shall pay 10*l.* and that plaintiff shall release to them, after they have released to him: the bond is valid as to A, though voidable as to the infant; and the award is good and mutual. 199
- 4 An award, that one of the parties and a stranger shall do an act, binds the party, but is void as to the stranger. 140
- 5 An indictment for battery cannot be referred to arbitration. 204
- 6 So of all causes criminal, unless by recommendation of the Court. 205, C. 208, *n. (a)*
- 7 Award to pay money in a stranger's house, is good, for licence shall be intended. *ib.*



## AWARD.

- 8 Award "to pay 40s. for a trespass" is good and mutual. 205
- 9 The award, is, that defendant shall pay 20l. to plaintiff in satisfaction of all trespasses, and that they shall give mutual releases up to the time of the award: if further trespasses were committed between the submission and the award, the award, though it may be void as to the releases, is good for the rest. 265-6 & n. (d)  
That the award of releases in the above case is not wholly void, See n. (e), *ib.*
- 10 On a plea of *no award*, the plaintiff states an award in his replication; it is no departure to rejoin matter of fact which makes it void. 266 & n. (e)
- 11 An award that one party shall pay the other 10l. and give mutual releases, is good. 356
- 12 Arbitrators may appoint an umpire at any time after the expiration of their own authority and before the time limited for the umpirage. 378
- 13 Arbitrators, who lay down their business, may resume it, and make an award within the limited time. *ib.*
- 14 In debt on bond to perform award, the plaintiff must aver that it was ready to be delivered, &c. when the submission is in those terms. 415
- 15 Discontinuance allowed in debt on bond to perform an award. *ib.*
- 16 Arbitrators award releases of all actions to the time of the award: it shall be intended that no new matters happened between the submission and award, unless shewn. 462
- 17 Replication to plea of *no award* must shew an award agreeable to the submission; and *secundum formam et effectum* is not enough. 467  
So the words *duly* and *in due manner* will not cure the defective statement of the formalities of the award. n. (a), *ib.*
- 18 Defendant, who pleads *no award*, is estopped from taking any exception which supposes an award made. 526

## BAIL.

(See SHERIFF, 5, 6, 7.)

- 1 Statute 23 Hen. 6, on sheriff's bonds, is a private act, and must be pleaded. 101, *sed vid.* n. (a), *ib.*
- 2 What variance in the description of the plea will avoid a bail bond. 105
- 3 The writ was returnable in *cancellaria ubicunque* &c. and the bail bond was to appear in *cancellaria apud Westmonaster' ubicunque*, &c. held a fatal variance. 118
- 4 In *scire facias* by an administrator against bail, a plea that the intestate did not sue out any *ca. sa.* against the principal, is

## BARGAIN AND SALE.

- good, without saying that neither intestate nor the administrator did. 338
- 5 Bail are discharged by the death of the principal before the return of the *ca. sa.* *ib.*
- 6 Where part is levied on the principal, the bail are liable for the residue. 344
- 7 Bail in error are estopped by the record of judgment affirmed, remitted by the Exchequer Chamber into King's Bench. 375
- 8 Bail may render their principal at any time before the return of second *sci. fa.* If on the last day of term, it must be *sedente curia*. 441
- 9 Court of King's Bench will not bail a peer committed by House of Lords, though the commitment be "for contempt" generally, and "during the pleasure of the King and of that house," and though the house be adjourned. *Semb. aliter*, in case of prorogation or dissolution. 459-4

## BAILIFF.

(See DISTRESS, 9, 10.—REPLEVIN, 11.)

- 1 A bailiff errant, or special bailiff, is not bound to take the oaths prescribed by 27 Eliz. c. 12. 419
- 2 Bailiff of a manor may be made by word of mouth. 587  
On the authority of the bailiff of a manor, See n. (c), 536

## BANKRUPT.

- 1 The Chancellor has no authority to grant a commission of bankrupt without petition in writing; but after such petition he may grant, repeal, or supersede commissions *toties quoties* without a new petition. The grant of a new commission is a *supersedeas* to the old one. 270
- 2 Payment to a bankrupt before commission issued is good, if made without notice of bankruptcy, or by compulsion of law. 349
- 3 One who contracts with the king to victual the navy, is not a trader within the bankrupt laws, although he sells the surplus. 391
- 4 Goods seized under an execution after bankruptcy and before commission issued, pass to assignees. 397
- 5 A party arrested for debt is set at large on bail, but afterwards renders himself to prison [*where he lies for two months*] *quare*, whether his bankruptcy shall relate to the first arrest, or to the render? 539, 540 & n. (a)

## BARGAIN AND SALE.

(See LEASE 10.—PLEADING 42.—  
USE 1, 4, 6.)

- 1 A bargain and sale, without pecuniary con-

## BARGAIN AND SALE.

sideration, may operate as a covenant to stand seised. 568-9

- 2 A deed of bargain and sale, in which money is mentioned to have been paid, is good, though in fact it never was paid. 529

## BARON & FEME.

(See ACTION, 8.—COPYHOLD, 26.—FINE, 9. LEASE, 12.—MARRIAGE.—NUISANCE, 1. RELEASE. 10.)

- 1 The wife may join as plaintiff where the action would survive to her, and she may join in many cases where she is not bound to do so. 236
- 2 The defendant's wife bought goods of the plaintiff, a mercer, which the defendant paid for: the defendant is afterwards separated from his wife, who buys more goods of the plaintiff before he has notice of the separation: the defendant is liable for them; *semb. secus*, if she had afterwards taken up goods of a stranger. 248-9
- 3 For cases in which the husband is liable upon contracts of the wife after separation. See n. (b), 249
- 4 Trust deed of separation is no bar in the ecclesiastical court. 283, C. 324, n. (b)
- 5 *Feme covert* may sue alone in the spiritual court for defamation, and the husband's release is no bar: *aliter*, if the suit be for a legacy or other duty. 291, and see n. (a)
- 6 The widow's claim to paraphernalia must yield to the claim of her husband's creditors, though she may have bought the ornaments out of her own pin-money, provided she was living with her husband. 304
- 7 Baron and feme, seised to them and the heirs of the baron, make a lease, and then join in an action of waste; *semb.* a count concluding *ad exheredationem eorum* is bad. 343
- 8 In a suit against baron and feme as administratrix they must both plead. 351
- 9 *Hab. corp.* granted on suggestion that a lady was confined and ill treated by her husband; and the husband bound to the peace and good behaviour. 376-7
- 10 A bond by husband to wife before marriage, conditioned to leave her 1000*l.* at his decease if she survives, is not extinguished by intermarriage. 512; and see n. (b), 515

## BASTARD.

- 1 An order for a yearly payment by the reputed father of a bastard is bad. 414
- 2 The sessions have no power to make an original order in cases of bastardy. 483; *sed vide* n. (a), *ib.*

## BOND.

### BILL OF EXCHANGE & PROMISSORY NOTE.

(See ASSUMPSIT, 1, 2.)

- 1 When a bill is evidence on a general count in *assumpsit*. 14 & n. (c)
- 2 A note held assignable in equity though not at law. 312

## BISHOP.

(CHURCH, 14, 20.)

- 1 Whether proof of a will is before the bishop in person or his chancellor. 65, C. 70
- 2 A bishop seised of two manors which had been anciently let together at an entire rent, leased both to A. at the antient rent for three lives: A. underlet part to B. and then surrendered the whole to the succeeding bishop, who leased the manor (excepting the part underlet), reserving the whole antient rent; held that the second lease was good within 1 Eliz. c. 19. 179.
- 3 In a lease under 1 Eliz. c. 19, it is enough if the same yearly rent be reserved, although payable on different days. 180
- 4 Two farms, usually leased separately, cannot be jointly demised by a bishop reserving the two former rents entirely. 181
- 5 More than the old rent may be reserved under 1 Eliz. c. 19. 182
- 6 A reservation in an ecclesiastical lease of the "old rent" generally, is bad. 183
- 7 Lease by a bishop of two acres, reserving a rent out of one, is bad. *ib.*
- 8 Of concurrent ecclesiastical leases, 183-4
- 9 Part of a farm usually let at a certain rent may be demised by the bishop at a rent *pro rata*. 184
- 10 An ecclesiastical lease is not binding, which reserves less than the old rent to the lessor, although the old rent or more be reserved to the successor. 185
- 11 When a parsonage is appropriated to a bishop, living the incumbent; a lease by the bishop before the incumbent's death is void. 527

## BOND.

(See ACCORD, 3.—AWARD, 3.—BARON AND FEME, 10.—DEMAND, 1, 2.—EXECUTORS, 11, 70.—GAMING, 1.—INFANT, 2, 3.—MORTGAGE, 3.—PLEADING, 32.—USURY, 1.)

- 1 Unlawful maintenance may vitiate part of the condition of a bond, without avoiding it for the whole. 81
- 2 Obligor is estopped by the recital of a custom in the condition of his bond. 100
- 3 If an obligation be joint and several, the creditor may charge the surviving ob-

## BOND.

- ligor, or the executor of the deceased, at election.. 128
- 4 *Obligamus nos et quemlibet nostrum* makes a bond joint and several. *ib.*
- 5 A covenant by A. to save B. harmless from a bond in which they are jointly bound to C., extends to a wrongful suit by C. against B. upon the bond. 142
- 6 In debt on a bond conditioned to perform covenants in an indenture, a plea of performance must make *profert* of the indenture. 156
- 7 Where the condition of a bond is to make such assurance as the obligee's counsel shall advise, within six months, or else to pay 300*l.* it is a good defence to say, that the obligee's counsel did advise no assurance within six months. 228-9
- 8 Where the condition is in the disjunctive, and one part is made impossible by the act of the obligee, the obligor is excused from the other: *aliter*, where one part is made impossible by the act of a mere stranger. 229
- 9 A bond, with condition that if the obligor do not pay the money, it shall be void, shall be construed to become void on *payment* of it. 247
- 10 A writing shall be intended to be an obligation, if the description in the declaration imports it to be one, although sealing be not averred. 265
- 11 The condition of a bond was, that if the obligor by the 10th of November, did not legally prove money paid, then if he paid the money on that day, the bond should be void. Held, that the bond was not discharged by the death of obligor before that day. 269 & n. (a)
- 12 Whether, and when, a man shall avoid his bond by duress to his co-obligor. 351
- 13 Bond to the warden of the Fleet for ease and favour, is void at common law. 375
- 14 Parol condition is not pleadable to a bill under seal. 483
- 15 If executor of obligee makes the obligor his executor, this is no extinguishment of the debt. 513
- 16 Obligor may discharge himself by paying the penalty before the money is due by the condition. 515
- 17 Where an obligee makes the obligor his executor, who administers but never proves, the bond debt is extinguished, unless there be a defect of assets for payment of creditors. 520
- That the debt is released, though he never administers, if he does not absolutely refuse, *see n. (a), ib.*
- That it is assets for the payment even of legacies, if such intention appears. *n. (a), ib.*
- That equity will consider the executor

## CHURCH.

- trustee for the next of kin to the amount of the debt, *n. (a), ib.*
- 18 Bad English, or mis-spelling, will not vitiate a bond. 541

## BOROUGH ENGLISH.

(*See HEIR*, 10.)

## BOTE.

(*See COVENANT*, 16.—*LEASE*, 14.)

## CALENDAR.

(*See COURTS*, 2.)

## CANONS.

(*See CHURCH*, 7.)

## CARRIER.

- 1 An action for the miscarriage of goods by water may be brought against the ship-owners, or the master. 499
- 2 It will lie *ex contractu*, without alleging the custom of England. *ib.*
- 3 It must be brought against *all* the owners, and a non-joinder may be shewn under the general issue. *Ibid. Sed vide n. (c)*, 500
- Whether a plea in abatement for non-joinder of owners be available when the declaration is in tort, *See n. (c)*, 500
- 4 There is no difference in law between a land-carrier and a water-carrier. 499

## CERTIORARI.

(*See CINQUE PORTS*, 6, 7.)

- 1 How far a conviction for deer-stealing under 13 Car. 2, is examinable in B. R. by *certiorari*. 409

## CHARITY.

- 1 When money is given to charitable uses generally, the king shall have the disposal of it: if the charity be expressed, the commissioners for charitable uses have authority. 330

## CHURCH.

(*See ADVOWSON*.—*EXECUTION*, 4.—*INFORMATION*, 5. 6.—*PROHIBITION*, 21, 31.—*QUARE IMPEDIT*.—*SIMONY*.)

- 1 The value of a benefice within 21 Hen. 8, c. 13, concerning pluralities, shall be estimated by the valuation in the king's books. 27
- 2 Upon acceptance of a second benefice with cure, the patron of the first may present to it, be the value what it may: but lapse shall not incur against him without notice, unless the first be of the value of 8*l.* 51-2

## CHURCH.

- 3 Acceptance of a second benefice is void *ab initio* by not subscribing, and such acceptance therefore will not vacate the first. 52
- 4 Loss of the second benefice, by not reading the articles, does not restore the incumbent to the first which he had forfeited. *ib.*
- 5 When a benefice is vacated by not reading the articles, no lapse incurs against the patron without notice. *ib.*
- 6 Default in reading does not vacate the benefice *ab initio*. *ib.*
- 7 The canons of 1608 have been confirmed by Parliament, and have the force of a statute. 171, *Sed vide n. (f)*.
- 8 The king presents to a church vacated by simony, and then an act of pardon is passed containing a restitution of forfeitures: *semb.* the right of the patron to present is not restored by the pardon. 197
- 9 The king may revoke a presentation by express words—*Quere*, whether general words of restitution in a pardon of simony will have the same effect? 198 & notes *ib.*
- 10 Since the statute of dissolution, impropriations are become lay fees. 231 & n. (a).
- 11 A lay impropriator is liable to censure and excommunication for non-repair. 232
- 12 Impropiators are liable to procurations and synodals. *ib.*
- 13 The patron may take notice of an avoidance by plurality, where he is not bound to do so. 242
- 14 A prebendary of Ely is made dean by the king; shall the king or the bishop present to the prebend? 256
- 15 Chancellor of the diocese cannot grant a commission to tax parishioners for the repairs of the church. 286
- 16 Church-rates, how examinable and recoverable. 289, 299
- 17 Building and repairing an isle will not exonerate any one from repairing the church, unless he sits in the isle and has no benefit of the nave. 301
- 18 Clergy are contributory to the repairs of a bridge. 359
- 19 So of highways; and they are liable to public charges, as watch and ward, constables' rates, &c. 396, 490, 491
- 20 A mandate to induct, granted by the guardian of the spiritualties, cannot be executed by the archdeacon after the consecration of a new bishop. 457; reversed on error, 463  
Whether induction be examinable in the temporal courts, *see* 457, n. (a), & 463
- 21 Prescriptive exemption from repairs of a church, by reason of repairing a chapel of ease, is good. 468

## COMMON.

- 22 Major part of the whole chapter must be assembled to do a corporate act. 505, C. 678, & n. (a)

## CHURCHWARDENS.

(*See* ASSUMPSIT, 26.—MANDAMUS, 1, 2.)

- 1 Churchwardens may present offences committed before they came into office. 286
- 2 Churchwardens may be required to swear "to present all offences against the king's ecclesiastical laws, according to law;" but not to present all offences against the articles of visitation. 288
- 3 Spiritual court will not be prohibited for citing churchwardens after the expiration of their office, to make presentments by virtue of their oath of office. 290
- 4 A churchwarden is not compellable by the Ecclesiastical Court to present a delinquent. But if he refuses, he may be presented by his successor. 298-9

## CINQUE PORTS.

- 1 *Habeas Corpus* lies to remove a prisoner in execution within the cinque ports. 12
- 2 The cinque ports have no privilege against the king. *ib.* & n. (a)
- 3 Lands within the cinque ports may be seized in case of outlawry, and extended upon judgments. *ib.*
- 4 A *quo minus* runs into the cinque ports. *ib.* n. (a). *But see* Gilb. C. P. 195
- 5 Plea of privilege of the cinque ports must aver that defendant was commorant there. 12, 13
- 6 Where a *certiorari* is directed to a cinque port to remove orders made by the corporation for taxing the lands of the foreign, a return alleging the privileges of the port must shew some jurisdiction to which the party aggrieved may appeal. 99
- 7 *Certiorari* lies to the cinque ports in matters of the revenue, or criminal matters, or where the liberty of the subject is concerned. *ib.*

## CLERGY.

(*See* CHURCH.—HIGHWAY, 2.)

## COMMON.

(*See* ACTION ON THE CASE, 3.—EJECTMENT, 5.—PRESCRIPTION, 2, 4.)

- 1 The custom was to have common for two years from the time of reaping to re-sowing, and to have common for the whole year, in every third year, when the land used to lie fallow:—held, that a commoner might continue his cattle on the land for any number of years, if it lay unsown so long. 23
- 2 A grant of common to mayor and bur-

## COMMON.

- gesses will extend to an increased number of burgesses. 135
- 3 On the statement of plaintiff's title to common in an action for disturbance, *See* 145 & n. (c). 135
- 4 A lord of a manor may licence a stranger to put his cattle on the common, leaving sufficient for the commoners; and a plea, justifying under such licence in an action by a commoner, must aver that sufficient was left. 190
- 5 Such a licence *pro hac vice* may be without deed: *secus*, if for a time certain. *ib.*
- 6 Such a licence to put in *averis sua* extends to hogs. *ib.*
- 7 Where several persons have lands lying in a common field, and they prescribe to inter-common together, they may also prescribe to inclose against one another. But where one prescribes for common appendant to land, not parcel of the field, the owner of the soil cannot prescribe to inclose against him. 211
- 8 *Quarra*, whether one commoner can distrain the cattle of another commoner, who surcharges with cattle not *levant et couchant*? 273 & n. (a).
- 9 In such a case the lord may distrain, and the commoner may bring an action on the case. *ib.*
- 10 Any commoner may distrain the cattle of a stranger. *ib.*
- 11 One commoner may distrain the cattle of another, where the common is for a certain number of cattle. 273
- 12 So many cattle are *levant et couchant* as the estate will keep in winter. 274
- 13 In case for disturbing common, it is unnecessary to state a particular title to the land to which the common is appendant. 458

## CONDITION.

(*See* BOND.—COVENANT, 8, 14.—DEVISE, 35.—LEASE, 6.—REMAINDER, 11.)

- 1 No advantage can be taken of a condition, *nomine pance*, or penalty for non-payment of rent, without a demand. 24-5
- 2 If a devise be to one upon condition, the devisee must take notice of the condition at his peril. 31
- 3 Infant is bound by a condition annexed to a devise. 32
- 4 Where a condition in restraint of marriage is in *terrorem* only, *See* 302  
Parol condition is not pleadable to a bill under seal. 483

## CONSIDERATION.

(*See* ASSUMPSIT.—COVENANT, 19.—DEED, 1, 3.—USE, 2, 3, 4.)

## COPYHOLD.

### CONSTABLE.

(*See* LEET, 2.)

- 1 Indictment against, for not executing a warrant, must aver that he was constable at the time of delivering it. 524

### CONTEMPT.

(*See* BAIL, 9.)

- 1 On commitments for contempt, *See* n. (a), 2
- 2 No writ of error lies on commitment for contempt. 5 & n. (e)
- 3 Contempt *in facie curie* is punishable immediately and without the presentment of a jury. C. 326, n. (a), 283
- 4 To translate and print a writ of prohibition is a contempt. 288

### CONTRACT.

(*See* FRAUDS, STATUTE OF, 3.—TENDER, 6.)

- 1 If I am bound to do an act, in which a stranger must concur, I must procure his concurrence at my peril. 96
- 2 In personal contracts, the party is not bound to deliver goods till he have the money, unless a day be fixed for payment. 195

## COPYHOLD.

(*See* COURTS, 12.—POWER, 15.)

- 1 Court baron may be holden before the steward by prescription. 12 & n. (a); 316
- 2 Where the wife is endowed of a moiety of copyhold lands descendible in the nature of gavelkind, and two sons by different venters are admitted to the reversion of that moiety, and the son by the second venter dies; the admittance shall not cause a *possessio fratris* in him, so as to make his sister take. 45
- 3 Entry, and not admittance, occasions a *possessio fratris* of a copyhold. 46, n. (a)
- 4 Whether a recovery of the fee, suffered in a court-baron by a copyholder for life be a forfeiture? Admitting it to be so, the lord, and not the remainder-man, shall take advantage and hold for the life of the copyholder. 192
- 5 Where the custom of a manor warrants only estates for lives, the surrenderer after admittance is in under the lord. *ib.*
- 6 If the lord grants the freehold of a copyhold, the copyholder is attendant on the grantee for all things but suit of court, which is lost. *ib.*
- 7 *Semb.* a surrender by a copyholder to a disseisor, lord of a manor, *ad faciendam inde voluntatem suam*, operates as an extinguishment: and a voluntary grant of



## COPYHOLD.

- the copyhold by the disseisor is void against the disseisee. 245
- 8 A disseisor lord may take a surrender to an use, but he cannot thereupon grant a larger estate than what was in being before. *ib.*
- 9 A disseisor lord may do any act which the rightful lord may, if it does not tend to prejudice the rightful lord. 245-6
- 10 *Semb.* the possession of the copyholder will not prevent the lord from being disseised. 246
- 11 Under a custom for a copyholder for life to destroy remainders by surrender, he cannot destroy them by fine. 263
- 12 A remainder may be limited on a fee in a surrender of a copyhold. 267
- 13 A surrender of a copyhold *in futuro* is good. *ib.* 268
- 14 A custom for a copyholder to pay on admittance a year's value of the land, as it is at the time of admittance, is good. 494
- 15 A custom to pay what fine the homage shall set, is good. *ib.*
- 16 A custom in a manor, that if the heir come not in to be admitted after three proclamations at three courts, the copyhold shall be seized as forfeited absolutely, is good. 494-5
- 17 But such custom shall not bind the heir within age. 495  
*Quære*, if a custom, expressly binding the infant heir, would be good? *ib.*
- 18 If an infant heir delay to be admitted, the fine may be increased accordingly. *ib.*
- 19 Until admittance, the estate is in the surrenderor. *ib.*
- 20 If a fine be certain, it must be tendered on admittance; if uncertain, the lord must set it, and fix a time and place for payment. 496
- 21 Five years' value is a reasonable fine on admittance, where nothing is payable except on the first purchase. *ib.*
- 22 Copyholds are part of the demesnes of a manor. 507
- 23 If tenant for life of a manor leases a copyhold under a power, the copyhold is absolutely destroyed. 508
- 24 The surviving co-parcener of a manor, who is also heir to the deceased, cannot enter for a forfeiture (as for waste, or a lease without licence) committed by a copyholder in her sister's lifetime. 516
- 25 Permissive waste is a forfeiture of a copyhold. *ib.*
- 26 Freebench is defeated by a forfeiture, surrender, or a lease with licence, by the husband. *ib.*
- 27 Where the act of a copyholder is an extinguishment of his copyhold, the heir may enter for it: *aliter* if it be only a forfeiture at the lord's election. 517

## COSTS,

- 28 What shall amount to a dispensation of a forfeiture. *See* 517

## CORPORATION.

(*See* ATTACHMENT, 6.—ATTORNEY, 4.—CHURCH, 22.—COMMON, 2.—OFFICE, 13.—PRESCRIPTION, 4.)

- 1 Whether a bye-law in pursuance of a custom in a borough, that "no man shall exercise any trade, mystery, or science, &c. unless he be a freeman, or work with a freeman," be valid; and in whose name an action thereon shall be brought? 36
- 2 On the remedy against a corporation for refusing to give their freedom, *See* 36 & n. (c)
- 3 A new grant from the king, taken by a corporation under a new name, will not destroy an ancient court. 321
- 4 When a corporate officer is appointed *durante beneplacito*, the corporation must determine their will under seal. 428  
*Sed quære?* *Vide* n. (a) *ibid.* on the removal of such officers.
- 5 The name of a corporation is "the mayor, bailiffs, and burgesses," and the power of electing and amoving the recorder is in the mayor and burgesses only: *quære*, whether a *mandamus* to restore be well directed to the latter? 441-2  
That the writ must be directed to those who are to do the act required, *See* n. (a), *ib.*
- 6 Power of restoring a corporate officer is implied in the power of election. *Per* Wild, J. 442
- 7 Acts of the majority are binding in a corporation. But the major number of the whole ought to be present, unless it be otherwise provided by the original constitution or antient usage. 504  
As to the distinction between a corporate body of a *definite* and of an *indefinite* number, *See* 505, C. 678, n. (a)

## CORONER.

(*See* ACTION ON THE CASE, 4.—INQUEST, 1.)

## COSTS.

(*See* COURTS, 4.—EJECTMENT, 3.)

- 1 An action on the case is not within 22 & 23 Car. 2, c. 9, which limits costs where plaintiff recovers less than 40s. damages. 214, 366
- 2 Where it appears of record that the title is in question, no certificate is necessary under the statute 22 & 23 Car. 2, c. 9. 215
- 3 When plaintiff brings an action of trespass for meane profits by way of action on the case with a *per quod*, and dam-



## COSTS.

- ages are 40s., he shall have no more costs than damages. 226
- 4 Whether under 22 & 23 Car. 2 it is sufficient to certify the *assault* without the *battery*? 366
- 5 Whether an action, commenced in an inferior court, and removed into the court above, is within the 22 & 23 Car. 2, c. 9? 366, 374
- 6 In trespass *quod domum fregit et bona asportavit*, there is a verdict of not guilty as to the *dom. freg.* and guilty as to the exportation, damages 15s.: plaintiff shall have full costs. 394
- 7 An executor, nonsuited in an action on an account stated between him and defendant for matters between testator and defendant, shall not pay costs. 424
- 8 Plaintiff, who names himself executor unnecessarily, shall pay costs. *ib.*
- 9 As to costs for not proceeding to execute a writ of inquiry, 435-6
- 10 No costs upon *non pros* in debt for treble value of tithes. 475

## COURTS.

(See COPYHOLD, 1.—INFERIOR COURT.)

- 1 A man cannot be *directly* ousted of his freehold by the sentence of a spiritual court; but he may *by consequence*. 84
- 2 The Courts will notice the calendar *ex officio*. 94 & n. (a)
- 3 Whether the Courts will take notice of an *ordinary* cart load? 101
- 4 The costs of a suit in the Spiritual Court are part of the judgment, and may be sued for there. 123, 130
- 5 No suit shall be in the Spiritual Court, where there is a remedy at common law. 123, 130
- 6 The Ecclesiastical Courts have the proper cognizance of alimouy. 282
- 7 Courts of law are not judges of the forms of proceeding in the Spiritual Courts. *Per Vaughan*. 285
- 8 All the Courts at Westminster are equal and co-eval. 312
- 9 Out of what courts an appeal lies into Chancery, *ib.*
- 10 Courts of Equity have no jurisdiction in the distribution of intestate's effects, nor of dilapidations: *aliter*, of legacies. 330
- 11 The Court will notice what is meant by a *sack* in a particular county. 483
- 12 A court baron and leet may be held together, and the acts done therein shall be referred to the proper court. 525

## COVENANT.

(See DEMAND, 6 — EXECUTORS, 55, 59 — LEASE, 14.—NOTICE, 4.)

- 1 An officer, A., grants a dependant office

## COVENANT.

- with a covenant for enjoyment as long as A., or any claiming under him, shall exercise the superior office, and also a covenant not to revoke or annul his grant: a surrender of the superior office is no breach. 20-1
- 2 The vendee of lands may sue on a covenant for title, although the sale have previously become void by the non-payment of money on a certain day. 41-2
- 3 In declaring on a covenant to deliver goods on request, and to put them in such quantities as the plaintiff should appoint on board such vessels as the plaintiff should prepare, plaintiff must aver that he appointed the quantities and prepared the vessels. 93-4
- 4 A general covenant for quiet enjoyment against all persons, shall only extend to lawful disturbances: *secus*, of a covenant against a particular person. 103, 124, 143; *and see* 450, C. 612, n. (a)
- 5 Defendant covenanted to convey a tenement to the plaintiff for the lives of the plaintiff and of two others named by him, and to give up possession before Christmas: held, that the latter covenant was not independent, and that if the plaintiff neglected to name the lives, defendant was not obliged to give up possession. 121
- 6 It is a sufficient breach of covenant for quiet enjoyment, to shew a good title in another, without alleging an entry by plaintiff and eviction. 122
- 7 On a covenant to leave a way six feet broad, how a breach shall be assigned for narrowing it. 174
- 8 The lessor covenants that lessee "paying and performing all rents and covenants," shall quietly enjoy, &c. The words "paying" &c. do not make a condition precedent to the quiet enjoyment. 194
- 9 A. and B. covenant "for themselves and every of them," to assign a term, &c. This is a joint and several covenant, and the survivor or executor of the deceased may be sued. 248
- 10 If an assignee of a term breaks an express covenant, either he, or the lessee, or his executors may be charged: but if the assignee of an assignee breaks it, the first assignee is not chargeable. 338
- 11 No action lies on a covenant to stand seised. 352
- 12 If A. "sells, transfers, and assigns" to B. (by deed) money due to A. from a third person, covenant lies by B. against A. for not permitting him to receive it. 368  
That covenant lies for any act done by defendant which defeats his grant,  
*See n. (a), ib.*
- 13 On a lease for years rendering rent to a

## COVENANT.

stranger, lessor may bring covenant for non-payment, but not the stranger.

*Ib.* & n. (b).

14 Covenant to pay A. an annuity on condition that A. shall reside wherever B. and C. shall appoint and approve: this is a condition subsequent, and A. may reside at any place so long as B. and C. appoint no other. 376

15 A covenant to pay so much a ton, is not broken by refusing to pay a rateable sum for odd hogsheads. 379

16 Lessee covenants that lessor shall cut twenty of the best trees on the land at any time during the term: it is a breach for lessee to cut any even for house-bote. 397

In such a covenant, the *best* means such as the lessor shall esteem so. *ib.*

17 Covenant for payment of rent and a bond to perform covenants are defeated by the determination of the rent. 402

18 The words *grant* or *infeoff* do not imply a covenant in the case of a freehold. In the case of a chattel, *dedi* amounts to a covenant. 414

19 Defendant covenants by deed, reciting a consideration, to pay an annual sum to plaintiff; the covenant is good, though the consideration appear to be void. 447

As to the failure of auxiliary or dependent covenants, *see references* in n. (a), *ib.*

20 In declaring on a covenant by lessee to deliver up possession to lessor at the end of the term, it is needless to allege a request, but defendant may plead that he was ready to deliver, and that nobody was there to receive. 462

## COVENANT TO STAND SEISED.

(*See* BARGAIN & SALE, 1.—USE, 5, 7.)

1 No action lies on covenant to stand seized. 352

2 A. covenants "that if he shall die without issue of his body, then he doth give, grant &c. to B. his mother" the lands in question: the conveyance shall enure as a covenant to stand seized. 469

## CUSTOM.

(*See* PRESCRIPTION & CUSTOM.)

## DEBT.

(*See* RENT, 6.)

1 Grantee of a rent reserved on a lease for years may bring debt against the lessee after attornment. 1

2 Debt lies for a rent-seck for years. *ib.*

3 A. delivers money to B. to pay to C.: if B. neglects to do so, A. may sue him in debt as for money lent. 14

## DEMAND.

4 Or C. may sue B. in debt as for money had and received to his use. *ib.* & n. (b)

5 Debt lies on a statute-staple under seal. 45 & n. (b)

6 Whether debt lies in the Courts at Westminster for using a trade without having served an apprenticeship; the offence being committed out of Middlesex? 64, & 65 n. (a), 377-8, 534

7 In debt on a penal statute, the defendant may shew a proviso in the same statute, or a licence in pursuance of such a proviso, upon *nil debet*. 129

## DEED.

1 A consideration is not necessary in a deed for a personal duty. 97

2 When many words of conveyance are used, the alienee may elect which way he will take. 259

3 Where a deed is executed without consideration, a trust will result in equity. 304

4 No estate can arise by implication in a deed: but an old estate may be moulded and qualified by implication. 372

5 On the effect of the words *grant*, *dedi*, *enfeoff*, in a conveyance. 414

6 A termor for years, reciting his lease, grants the *land and said recited lease and all his deeds*, &c. *habend.* after his death for the then residue of the term: an estate at will only passes. 500; *Sed vide* 501, n. (e) & (e).

7 If the grant be of *all his term or estate*, with a similar *habend.* the grant is good, and *habend.* void. *ib.*

8 Grant by termor of *his land* generally, passes only an estate at will. 501; *sed vide* n. (c), *ib.*

9 Grant of *his lease* passes the term, unless it appears that the deed of lease only was intended. *ib.*

10 A repugnant *habend.* is void: *aliter*, where it consists with and explains the premises. *ib.*

## DEMAND.

(*See* CONDITION, 1.—COVENANT, 30.—LEASE, 6, 16.—ASSUMPSIT, 31.)

1 In debt on a bill obligatory to repay money on demand, no special request is necessary. 113

2 When an action is brought on a penal bond conditioned to pay money on demand, or on a promise by a stranger, a special demand is necessary. 113, C. 135, & n. (a). *Sed vide* 439

3 *Licet sapius requisitus* is a sufficient averment of a special request, except on special demurrer. n. (a), 113

4 On a promise to pay at any time within a month on request, the creditor may re-

## DEMAND.

- quest after the month, and the debtor shall then have a month to pay. 346
- 5 In declaring on a covenant by lessee to deliver up possession to lessor at the end of the term, it is needless to allege a request. 462
- 6 In covenant on a lease "yielding and paying 10l. at Michaelmas if demanded, or within ten days after," no statement of a demand is necessary. 463

## DESCENT.

(See DEVISE, 16.—GAVELKIND, 1, 4.—HEIR.)

## DEVISE.

(See FRAUDS, STATUTE OF, 2, 4, 5, 7, 9, 10.—GUARDIAN, 2.—REMAINDER, 5, 6.)

- 1 A. seised in fee, devised, that if his son and two daughters should die without issue, his nephew should have the land. Held that the son and daughters took no estate by implication; that a base fee descended to the heir, determinable on the failure of the issue of himself and his sisters; and that the nephew took by way of executory devise. 11
- 2 The heir can only be disinherited by necessary implication. 11 & n. (b)
- 3 An express devise will not preclude the devisee from also taking a devise by implication. 11 & n. (c)
- 4 If a devise be upon condition, the devisee must take notice of the condition at his peril. 31
- 5 Infant is bound by a condition annexed to a devise. 32
- 6 A devise to A., and, if he die without issue, to his brother, gives A. an estate tail. 74
- 7 The devisor having three sons, A., B., and C. devises lands to B. and C. "and if B. dies without heirs, C. shall have his part; and if C. dies without heirs, A. shall have it:" *semb.* B. has an estate tail, and C. an estate for life, in their respective moieties. 85
- 8 A devise of "all the devisor's tenant-right estate," passes a fee. 112
- 9 A writing will amount to a devise, if the intent appear, although there be no technical words. 143
- 10 A devise will pass a fee without the word *heirs*, if the intent appear. 164
- 11 Whether the devisee of the land shall have the growing crops in preference to the legatee of the personalty? 165
- 12 A. devised a farm to his wife for her life, "and by her to be disposed of to such of his children as she should think fit:" held, that she took an estate for life with a power to dispose of the fee. 176
- 13 An express estate for life by devise shall not be controlled by implication. *ib.*
- 14 Devise of an interest and of a power distinguished. 177

## DEVISE.

- 15 A devise "to dispose at will and pleasure" or "as the devisee shall think fit" or "at his discretion" passes a fee. *ib.*
- 16 A. had a sister, who married, and had issue a son; her first husband dying, she married B., by whom she had issue a son C. and a daughter D. A. devised to his sister "till her son C. should attain the age of twenty-one, and then to C. and his heirs; but if C. should die before he came of age, then he devised to the heirs of the body of B." C. died before the age of twenty-one and in the life-time of B.: Held (1) That A's sister (who was also his heir) took a term of years certain by the devise which did not cease by C.'s death: (2) That C. took a fee vesting immediately in interest upon A.'s death, with the possession expectant on his coming of age: (3) That the devise to the heirs of B's body was executory and became void on the death of C. before B.: (4) That D. took by descent the fee which had vested in her brother. 243
- 17 Devise to an infant *en ventre sa mere* is good. 244, 293
- 18 A. devises land to his heir "within four years after his death, paying to his daughter 20l." *semb.* the land shall go to the executors for the four years, and the heir takes by purchase. 248, *Sed vide* n. (a), *ib.*
- 19 What words amounted to a republication of a will before the statute of frauds. 264
- 20 A long term of years is devised to several successively, for their respective lives: after their decease it shall revert to the executors of the devisor. But if the last limitation be to C. generally (without saying "for his life") or to C. and his assigns; or to C., and if C. die without issue remainder over to another; then the executors of C. shall have it. 278
- In such a case each devisee for life in his turn has the whole term vested in him, and the next in remainder has only a possibility of remainder, and the executors of the devisor a possibility of reverter. n. (a), *ib.*
- 21 A man having both a son and a grandson named *Robert*, devises land "to his son *Robert*"; the son dies, and afterwards the devisor republishes his will, and declares by parol that his grandson shall have the land: held, that the grandson shall take. 292. *Sed vide* 477
- 22 Under a devise "to his son *R.*", a grandson of the devisor of same name shall take, if he has no son. 292
- 23 Under a devise of "all his lands in *D.*" after-purchased lands will pass, if the will be republished. *ib.*
- 24 Parol averments are admissible in wills to ascertain the person, but not to alter the estate. *ib.*

## DEVISE.

- 25 Under a devise to A. and his heirs, the heir shall take nothing, if A. dies before the devisor. 293
- 26 Annexing a codicil amounts to a republication. *ib.*
- 27 A. devises several parcels to B. and C., two brothers, "and if either die, that the other shall be his heir:" *semb.* upon the death of B., C. shall only take a life estate. *ib.*
- 28 A devise to *Margaret* daughter of W. K. is good, though her name be *Margery*. *ib.*
- 29 On the construction of the word *survivors* in a will. 301
- 30 Where lands are devised for the payment of debts and legacies, the legacies must be postponed to the debts; and in such case equity makes no distinction between specialties and simple contracts. 305
- 31 A devise of land, on condition of paying a sum annually for another's life, passes a fee: *secus*, if the payment is to be out of the profits of the land. 438
- 32 On the construction of a devise during exile. 448
- 33 A. devises to his younger son after the death of his (A.'s) wife, the wife shall not take by implication in the interim. 458
- 34 "Heirs male of the body of A. now living" is a good *descriptio personæ* in a devise; and A.'s son and heir apparent may thereby take a vested remainder during A.'s life. 472
- 35 A. devised all his lands to his younger son, charged with legacies to be paid within a certain time out of the lands, and amounting to more than the profits of the lands during that time: held, *first*, that a fee passed; *secondly*, that the payment of legacies was a trust and not a condition. 479, 480
- 36 Devise by a termor of his land generally passes the whole term. 501
- 37 Under a devise to A. for life, remainder to his first son, &c. a son *in ventre matris* at A.'s death may take. 505
- 38 A devise to A. and his heirs, and if he dies before the age of twenty-one, or without issue of his body, then to B. &c. gives A. an estate tail. 509, 510
- 39 T. R. devises certain lands to A. for life and then devises "that all the rest and residue of his lands and tenements not expressly disposed of, should be sold by his executors," the reversion of the lands devised to A. passes to the executors. 519
- 40 A devise by tenant in common is not revoked by a partition and fine levied to corroborate it. 532 & *see n. (a) ib.*

## DIGNITIES.

(*See OATH*, 4, 7.)

- 1 The highest and lowest dignities are universal. 249

## DISSEISIN.

### DISCLAIMER.

- 1 On the necessity of a disclaimer of record to divest an estate, *See n. (b)*, 503

### DISCONTINUANCE.

(*See AWARD*, 15.)

- 1 Tenant in tail, with remainders over, makes a lease for life and then leases the reversion for years: held, that the lease for life (not being warranted by the statute) is a discontinuance during the estate for life, and the lease for years operates out of the tortious fee gained thereby: that on surrender by tenant for life on condition, the discontinuance vanishes, and the estate tail is restored: but that on re-entry by tenant for life for condition broken, the discontinuance is revived. 258-9

### DISPENSING POWER.

- 1 The king may grant a dispensation to sell wine without a licence, *non obstante* the statute 7 Ed. 6; and the dispensation is not determined by the king's death. 85
- 2 Such a dispensation is valid, as well when granted to a corporation aggregate, as to particular persons. 86, 90, 139
- 3 King cannot dispense with a statute made *pro bono publico*. 86, *Sed vid.* 116, 138
- 4 King may dispense with a statute made for his own benefit. 86
- 5 The dispensing power cannot be delegated to a subject. 87
- 6 A *malum in se* cannot be dispensed with, but may be pardoned. *ib.* & 493
- 7 A clause of dispensation against all laws to be made is void, but does not vitiate a dispensation in other respects good. 90
- 8 Dispensation amounting to a total repeal of a statute is bad. 117
- 9 What things are *mala in se*. 138
- 10 The king may dispense with a law which gives no particular person an interest, but concerns one person as much as another. *ib.*
- 11 No dispensation good in case of simony, or buying offices. 139
- 12 Abstract of Lord Chief Justice *Herbert's* argument on the dispensing power. 492-3

## DISSEISIN.

(*See COPYHOLD*, 7, 8, 9, 10.—*INFERIOR COURT*, 11.)

- 1 If a disseisor makes a feoffment severally to six persons, an entry by disseisee upon one will not re-vest the whole. 77
- 2 When a disseisor, who has long been in quiet possession, dies seised within five years after entry by disseisee, the entry is not tolled. 242-3
- 3 When the entry of a wrong-doer is a disseisin of the fee, and when a term or particular estate only is gained thereby. 263 & *n. (b)*

## DISSEISIN.

- 4 If disseisee receives rent of disseisor, the disseisin is purged, and disseisor becomes tenant at will. *Semb.* 528
- 5 A disseisin by wrongful entry is not a disseisin at election only. 529
- 6 If tenant at will makes a lease, the party disseised may elect to take either lessor or lessee as disseisor. *ib.*

## DISTRESS.

(See ACTION ON THE CASE, 7.—COMMON, 8 to 11.—KING, 2.—RENT, 2.—REPLEVIN, 11.—TENDER, 4.)

- 1 Whether distress be incident to a custom of drift? 103
- 2 Corn in sheaf or shock is not distrainable for rent arrear. 202
- 3 Sheaves or shocks may be distrained damage feasant. *ib.*
- 4 Corn in a cart may be distrained for rent. *ib.*
- 5 Whether a rent reserved on the assignment of a term of years may be recovered by distress? 218 & n. (a)
- 6 In trespass the defendant justifies under a distress for rent and services; the plaintiff may reply *hors de son fee* without taking the tenancy upon him. *Aliter*, in cases of assise and replevin. 221-2
- 7 Whether a fence may be broken down to distrain for rent? 339
- 8 A man may distrain for parcel of his rent without mentioning the residue: *aliter*, of an action of debt for rent. 344 & n. (b)
- 9 Bailiff of a manor, as such, may distrain upon the tenants for rent service, without a particular command: *aliter*, for rent charge. 536
- 10 Bailiff cannot distrain for amerciaments without warrant from the steward. *ib.*

## DISTRIBUTION.

(See EXECUTORS, 48.)

- 1 Under the stat. of distributions, no representation is admitted among collaterals beyond the children of the intestate's brothers and sisters. 297
- 2 The children of a deceased cousin german shall not have a distributive share with another cousin german. 298
- 3 Equity will not enforce distribution of intestate's effects. 330. *Sed quære.*

## DOWER.

(See COPYHOLD, 2.—GAVELKIND, 2.—INFERIOR COURT, 39.)

- 1 Where a writ of dower was brought against several purchasers, the sheriff was directed to charge all proportionably. 227
- 2 A view is not grantable at common law in a writ of dower *unde nihil*, &c. 375

## DURESS.

(See BOND, 12.)

## ERROR.

### ECCLESIASTICAL COURTS.

(See COURTS.—EVIDENCE, 1, 3, 4.—JUDGE, 2.—MARRIAGE, 1, 2, 8.—PROHIBITION.)

### ECCLESIASTICAL LEASES.

(See BISHOP, 2 to 11.—LEASE, 13, 19 to 26.—STATUTES, 5.)

## EJECTMENT.

- 1 A declaration in ejectment with a joint demise by two persons, omitting the surname of one, is bad. 146
- 2 In ejectment, defendant pleaded "*ancient demesne*;" a replication, that a fine had been levied, held bad. 261 & n. (a)
- 3 Whether an infant lessor in ejectment shall pay costs of nonsuit. 373
- 4 The demise in the declaration must not exceed the term which the lessor of the plaintiff in fact possesses. 400, *sed vide* n. (a)
- 5 Ejectment lies for common appurtenant to the land demanded. 447
- 6 The confession of defendant in the consent rule is sufficient proof of entry, when an actual entry is necessary. 468 & *see* n. *ib.*
- 7 Either lessor or lessee in ejectment may sue for mesne profits; and defendant is estopped to defend his title against the latter. 534-5 & n. (a)

## ELECTION.

(See COPYHOLD, 27.—DEED, 2.—DISSEISIN, 5, 6.—EXECUTORS, 54, 80.—SCAN. MAG. 2.)

## ENTRY.

(See DISSEISIN.—EJECTMENT, 6.—FINE, 9.—LEASE, 12.)

## ERROR.

(See BAIL, 7.—FINE, 14, 15.—INDICTMENT, 7.—INFERIOR COURT, 4.—OUTLAWRY, 3, 4, 5.)

- 1 No error lies on summary proceedings. n. (e), 5
- 2 Entry of judgment against the plaintiff in the county court for not replying *et ideo defendens dimissa est*, is erroneous. 56
- 3 Error assigned because the *venire fac.* in the Exchequer was returnable on Ascension-day. 94
- 4 Assignment of several errors in law and fact is bad on demurrer. 95
- 5 The *venire* in an inferior court ran thus: "*per quos rei veritas melius scire poterit*" instead of "*sciri*," held bad on error. 104, 281, 314
- 6 An assignment for error, that an infant appeared by attorney, is well concluded by *hoc paratus est verificare prout curia considerabit.* 106, 281
- 7 Error lies on a judgment given in any part of the dominions of the Crown. 147
- 8 In all writs of error to reverse outlawries, bail must be put in before the allowance;



## ERROR.

(by stat. 31 Eliz. c. 3,) and not only when want of proclamations is assigned for error.

- 162
- 9 *Misericordia* for *capiatur*, in an inferior court, is error. 281
- 10 A *venire* in an inferior court, expressing the number of the jurors in Roman figures, is not erroneous. *ib.*
- 11 *Consideratum est per majorem*, omitting *in curiâ*, is error in an inferior court. *ib.*
- 12 *Præceptum est* omitting *per curiam* in the *venire* of inferior court, is error. 281, 315, 318
- 13 Entry of the award of the *venire* may be in the past tense. 282
- 14 Return to a *vivâ voce* precept alleging that the parol is annexed to the precept, is erroneous. 314
- 15 Where there is enough written at length in the entry of the *venire* to shew that it is right, an &c. may be used in an inferior court. 318
- 16 Judgment in inferior court reversed, because the matter pleaded was not triable there. 319
- 17 A second writ of error is a *supersedeas*, if the first abates without default of the party. 347
- 18 Upon error in parliament, the parliament was prorogued from 3d of November to 7th January following, and the party purchased a new writ returnable at the next session: held that he was entitled to a *supersedeas*. 350
- 19 Outlawry reversed because the day of holding the court was in figures. 358
- 20 If one of two defendants dies before verdict, it is not error, if no judgment be entered against him. *ib.*
- 21 Error in *fact* is assignable in the same Court. 367-8  
This is usual in the King's Bench, but is never done in Common Pleas. *ib.*
- 22 *Semb.* Error lies in the Exchequer Chamber on a judgment in a cause removed into B. R. out of an inferior court. 374
- 23 Writ of error by bail, to reverse judgments in Ireland against the principal and themselves, abates *in toto*. 416  
The record of judgment against the principal is not thereby removed. *ib.*
- 24 Whether a writ of error be a *supersedeas* before allowance? 422
- 25 On return of *nihil* to a *sci. fa.* on a judgment, a *testatum ca. sa.* without a *capias* into the proper county, is error. *ib.*
- 26 No error lies on a judgment on the stat. of Winton. 435
- 27 Release of one parcener is no bar to writ of error by another. 505
- 28 Whether error on a conviction for scandalous words can be assigned by attorney? 522

## EVIDENCE.

### ESCAPE.

(See EXECUTORS, 64.—INFERIOR COURT, 8.)

- 1 Where a gaoler suffers a prisoner in execution to escape voluntarily, the party at whose suit he was in custody, may retake. *Aliter*, where the party consents to the escape, although he had no intention to discharge the prisoner altogether. 213 & n. (a)
- 2 A prisoner in the Marshalsea returned to prison after a voluntary escape and again escaped after the succession of a new marshal: the new marshal was held liable for the second escape. 398  
The party may have a *sci. fa.* or *ca. sa.* *ib.*
- 3 Rescous is a good plea to action for escape on mesne process. 409  
*Aliter*, on process of execution. *ib.*
- 4 A., being warden of the Fleet in fee, grants the office to B. for life, who suffers a prisoner in execution to escape: debt lies against A. 449  
But *semb.* it must appear that B. was insufficient at the time of action brought. *ib.*
- 5 On the escape of a prisoner in execution on civil process, *quare*, whether the party can retake him after a recovery (without satisfaction) in an action of escape against the gaoler? 451

### ESSOIN.

(See PRACTICE, 7, 8.—TENDER, 3.)

### ESTOPPEL.

(See AWARD, 18.—BAIL, 7.—BOND, 2.—EJECTMENT, 7.—LEASE, 32.—USE, 9.)

### ESTREAT.

(See ACTION ON THE CASE, 9.)

### EVICITION.

(See ASSUMPSIT, 16.—COVENANT, 6.—RENT, 10 to 13.)

## EVIDENCE.

(See OATH, 7.)

- 1 The courts of common law give credit to the sentences of spiritual courts, in matters whereof the latter have conusance. 83
- 2 Deed, read at a former trial between the parties, is admissible without proof by attesting witness. 84
- 3 Depositions in the spiritual court are not evidence, the Court not being of record. 84, & see n. (c)
- 4 Sentence of deprivation against plaintiff for simony is evidence against him in a court of law. 84
- 5 Copy of a parliamentary survey under the commonwealth admitted in evidence, the original having been destroyed. 509



## EXCOMMUNICATION.

### EXCOMMUNICATION.

(See ASSUMPSIT, 26.—CHURCH, 11.)

- 1 *Semb.* a writ *de excommunicato capiendo* cannot be superseded in B. R. on producing an appeal. 422

### EXECUTION.

(See BANKRUPT, 4.—ERROR, 25.—EXECUTORS, 63, 64.—RELEASE, 7.)

- 1 Lands within the cinque ports are extendable on judgments. 12; 148, n. (e)
- 2 Seizure of goods under *elegit*, without inquisition, is illegal. 33
- 3 On the execution of English judgments in the dominions of the Crown out of England. 147 & n. (d)
- 4 To a writ of *fi. fa. de bonis ecclesiasticis*, the ordinary cannot return that he has granted a sequestration, but must return *nulla bona* or *feri feci*. 231-2 & n. (d)
- 5 In executing the writ of *fi. fa. de bonis ecclesiasticis*, the ordinary is in the nature of an ecclesiastical sheriff. *ib.*  
And the sequestrators are as it were his bailiffs. n. (c), *ib.*
- 6 If one of several defendants die after judgment, execution survives as to the personalty, but not as to the realty. 366
- 7 A writ of execution on a judgment affirmed in B. R. must shew how the cause came there. 411
- 8 Payment to the gaoler by a party in execution under *ca. sa.* is no discharge. 453  
Payment to sheriff on a *fi. fa.* is good: *Semb. aliter*, on a *ca. sa.* *ib.*  
Tender by defendant, or a third person, to the sheriff before sale under a *fi. fa.* is good. n. (a), *ib.*
- 9 Payment to the sheriff on a *ca. sa.* is no discharge of defendant. 482

### EXECUTORS.

(See ABATEMENT, 4.—BAIL, 4.—BARON AND FEME, 8.—BOND, 15, 17.—COSTS, 7, 8.—FRAUDS, STATUTE OF, 6.—MERGER, 1, 4.—OCCUPANCY, 2.)

- 1 Non-joinder of co-executor as defendant, must be pleaded in abatement, and cannot be moved in arrest of judgment, though it appear on the declaration. 6
- 2 Debt against executor upon a simple contract is good after verdict. 7
- 3 The goods of an executor, as such, are not liable to forfeiture. 10
- 4 How an administrator shall plead when the administration is revoked, and granted to another. 13 & n. (a)
- 5 Bare possession of goods shall not make an executor *de son tort*. 13 & n. (b); 152
- 6 Trespass lies at the suit of an executor, for cutting and carrying away growing corn in the lifetime of the testator. 22-3

## EXECUTORS.

- 7 *Quære*, whether executor can bring an action for a trespass done to the natural produce of the testator's land? n. (a), 23
- 8 In *assumpsit* against an executor, who pleads several judgments and assets insufficient to satisfy any one of them, the plaintiff in his replication must answer all and not one only, *semb.* 28
- 9 On the form of replication when several judgments are pleaded by executors, n. (a), 28; 467, 537
- 10 To debt on bond, an administrator pleads an unsatisfied statute-staple: a replication "that the statute was burnt" is good. 44 & n. (a)
- 11 The obligee on a joint and several bond, who is executor of the executor of one of the obligors, may sue the survivor, unless he has received satisfaction out of the assets of the deceased. 49, 50
- 12 An executor is not bound at his peril to take notice of an original, sued out against him in the county in which he is comorant. 54
- 13 Rejoinder by executor that "he did not keep *the said judgments* on foot to defraud the plaintiff" omitting "*nor any of them*" is bad. 102, 121
- 14 A debt on simple contract is *bona notabilia* in the diocese where the debtor is. 102
- 15 If there be *bona notabilia* in England and Ireland, there must be two administrations: so if in the provinces of York and Canterbury: *aliter*, if the goods be in one English province and in France or the East Indies. 102
- 16 Executor may traverse a *devastavit* found by inquisition; but not if returned by the sheriff without inquest. 110
- 17 Under the general plea of *plene administravit*, defendant cannot shew payments made since the commencement of the action. *ib.*
- 18 One who gets goods of testator into his hands may be sued as executor, although [afterwards, and] before the writ brought, administration be granted to another during the minority of the rightful executor. 122
- 19 An executor may be sued on a promise in consideration of forbearance without averring assets, and although he have none. 125
- 20 An executor may plead a statute or bond outstanding, in which he himself was *jointly and severally* bound with the testator: But not if *jointly* only. 127-8
- 21 If an executor *durante minoritate* has duly administered and paid over the surplus to the executor of full age, he is discharged, and may plead *plene administravit*. 150
- 22 If such an executor commits waste and obtains a release from the executor of

## EXECUTORS.

- full age, yet he remains liable to creditors. *ib.*
- 23 It is no waste to pay legacies before debts, where the estate is sufficient for all. *ib.*
- 24 Whenever an executor or administrator has done what he ought, and has no assets in hand, he may plead *plene administravit*. But if he has assets liable to higher creditors, he must plead specially. *ib.*
- 25 Whether an executor, who takes the goods for safe custody only, will be thereby precluded from refusing the office? 151
- 26 When an executor has once administered, he cannot refuse, but is liable to creditors, though administration be granted to another. *ib.*
- 27 What intermeddling shall make a man an executor, *ib.*
- 28 When a person, named executor, takes the goods generally, it shall be intended to be an administration. 152
- 29 On the doctrine of *executor de son tort*, n. (d), *ib.*
- 30 When mere possession of testator's goods shall amount to an administration, 152
- 31 Taking the goods of the deceased by consent of the person to whom administration is afterwards granted, will notwithstanding amount to an administration. *ib.*
- 32 To debt in the *debet* and *detinet* against an executor for rent incurred in his own time the plea of *plene administravit* is bad. 171-2
- 33 Debt for rent by executor, on a lease by his testator, must be in the *detinet* only: *aliter*, if on a lease by himself. 172
- 34 To debt on an obligation against an executor, the defendant pleads a recovery in debt and no assets *ultra*, &c. without stating whether the recovery was upon a specialty or a simple contract. Held bad on demurrer, but aided by verdict. 215, 216
- 35 There may be an executor *de son tort* of a term of years, unless it be merged in the reversion by surrender. 218, & see 261
- 36 When an executor pleads a judgment not merely erroneous, but void, the plea is bad. 255
- 37 An administrator pleads a judgment recovered by himself against the intestate: *quare*, whether plaintiff can avoid it by shewing that judgment was entered up after the testator's death? *ib.*
- 38 A man dies in France, leaving goods in the diocese of Norwich; the bishop of N. shall grant administration. 256
- 39 An intestate died leaving four grandchildren, of whom one only was of age; administration was granted to the mother as guardian of the other three *durante minori etate* in preference to the one of age. 258

## EXECUTORS.

- 40 A stranger enters on land, of which an intestate was lessee, and feeds intestate's cattle with the hay that grew there: administration is afterwards granted to him excepting the term: *held*, that he is chargeable in the *debet* and *detinet* for rent incurred in his own time and before administration granted. 261
- 41 If a stranger enters on land generally, of which the deceased was lessee, and meddles not with his goods; he is a disseisor; but if he meddles as executor, he only gains the term. 262
- 42 Rent due on a parol lease is of as high a nature as a bond debt, and payment of it may be shewn against a bond creditor upon *plene administravit*. 262-3, 512
- 43 If executor *de son tort* takes out administration after suit and before plea, he may plead a retainer to satisfy his own debt; but not if *after* plea, *Per Ellis, J.* 265
- 44 Executor of obligee delivers up the bond and takes another in his own name, and dies intestate: what remedy have the obligee's creditors? *Quære*, whether this be a *devastavit* in the executor? 284 & n. (b)
- 45 The administrator *durante minoritate* of the executor of an executor is the representative of the first testator. 288
- 46 A. leaves a legacy to B. and C., his executors, between them, which they consent to take as legatees; B. dies; B.'s husband shall be prohibited from suing in the Ecclesiastical Court, for her moiety. 289
- 47 After the assent of the executor to a specific legacy, the legatee may sue for it at law. *ib.*
- 48 The half blood is equally entitled to distribution and administration with the whole blood. 294
- 49 A. is made executor for ten years, and then B. is to be executor; A. proves; after the ten years B. may refuse or administer without further probate. 313
- 50 Executor of executor not chargeable at law for *devastavit* by first executor: *secus*, in equity. *ib.*
- 51 A decree in Equity is to be satisfied by an administrator before a bond debt. 333-4
- 52 *Semb.* in an action of covenant for payment of rent against the defendant as executor, *plene administravit* is a good plea, although the rent incurred in his own time, and the declaration states an entry by him. 336
- How to declare against executor as assignee, *See* n. (b) *ib.*, 337
- 53 The rent is a charge upon the land, and only the surplus profits over and above the rent shall be assets. 337, 394
- 54 Where executor of lessee for years enters, lessor may elect to charge him as

## EXECUTORS.

- executor in the *detinet*, or as assignee in the *debet* and *detinet*. *ib.*
- 55 If an executor of lessee assigns the term, he is still liable *as executor* for rent, or on a covenant to repair, &c. 338
- 56 When assets are found sufficient to pay a part of the debt, the judgment on a plea of *plene administravit* shall be for the whole, and execution for that part. 351
- 57 An executor may join demands for rent which accrued in the testator's time and in his own. 367
- 58 In the case of an undue grant of administration, if it is about to be sealed, a *prohibition* issues; if it has passed the seal, a *mandamus* issues. 372
- 59 Covenant lies against the executor of lessee for non-payment of rent on an express covenant, though the defendant have assigned over before the rent became due. 377
- He must be charged *as executor*, and judgment is *de bonis testatoris*. *ib.*
- In such case debt lies not against the executor, if the assignee be accepted by the lessor. *ib.*
- 60 Debt lies not against the executor of an executor, upon a *devastavit* by the first executor. 392
- 61 An executor cannot wave a term of years; but if he lets it alone and the rent exceeds the value of the land, he is chargeable in the *detinet* only, for rent. 393
- 62 An administrator makes an underlease of the intestate's term, rendering rent to himself, his executors, &c. and dies: his executor, and not the administrator *de bonis non*, shall have the rent, and shall be chargeable with it as assets in the nature of an executor *de son tort*. 402
- But *semb.* he cannot distrain for it. *ib.* & 392
- 63 Administrator takes a man in execution and dies; the administrator *de bonis non*, and not the executor, may discharge him. 403-4
- 64 If a man, taken by an executor in execution, escapes, the sheriff must be sued in the *detinet* only. *ib.*
- 65 *Assumpsit* against an executor on a promise by him to pay in consideration that testator was indebted, is bad. 409
- That such form of declaring is good when defendant is charged in his representative character only, *see n. (a), ib.*
- 66 Administration *durante minoritate* of several executors, determines when one attains the age of seventeen. 425
- Administration during minority of one entitled to administer to an intestate, determines at the age of twenty-one. *n. (a), ib.*
- 67 Executor is not personally liable on a promise, if he administers, to pay his testator's debt. 434

## FALSE RETURN.

- 68 A stranger, who has goods of intestate in his possession, enters into an agreement with the administrator to pay a sum of money and retain the goods, (but in fact never pays the money); the administrator is chargeable as for a *devastavit*. 442-3
- 69 Administration granted on concealment of a will is afterwards revoked on the discovery of the will; *mesne* acts of administrator are void, and not made good by the subsequent refusal of the executor. 445-6
- 70 Debt on bond lies not in the *debet* and *detinet* against an executor, suggesting a *devastavit*. *Aliter*, of a judgment. 458
- 71 An administrator, suing for rent due since intestate's death, must shew that his intestate had a chattel interest. 463
- 72 To a plea of unsatisfied judgments by executor, plaintiff may reply fraud as to one only, without answering the rest. Judgment for plaintiff on such issue is *de bonis testatoris*. 467, 537
- Or plaintiff may reply fraud to any number of them. 537
- 73 When an executor shall be deemed an assignee, 476-7
- 74 A. died intestate, leaving issue B. and C.: C. for a valuable consideration released all right to the personal estate. B. died, making D. his executor and legatee of all his personalty: held that D. was entitled to administration of A.'s effects in preference to C. 496
- 75 Debt for rent on a demise by deed or parol is in equal degree with a bond debt. 512
- 76 On the effect of naming an obligor to be executor of the obligee. *See* 520 & *n. (a)*
- 77 Probate is unnecessary to make a complete executor, except where he must make *profert*. *ib.*
- 78 The executor of an executor is not executor to the first testator, unless the first executor proved. 520-1
- 79 Executor of an executor may prove as to his testator, and renounce as to the first testator. 521
- 80 A. makes a lease for years to B. of forty acres, parcel of sixty: the election may be made by B.'s executor. 530
- 81 Whether executor *de son tort* can justify a retainer for his own debt, by taking administration after action brought. 533
- 82 An executor may sue in his own name on an account stated with himself. 538
- 83 An executor may arrest before probate. 539
- Quære*, whether such arrest be good as against strangers? *n. (a)*, 540

## FALSE RETURN.

(*See* ACTION ON THE CASE, 4.—HABEAS CORPUS, 8.—SHERIFF, 5, 9.—VENUE, 2.)

## FEEES.

### FEEES.

(See ASSUMPSIT, 13.—ATTORNEY, 3.)

### FENCES.

(See ACTION ON THE CASE, 3.—DISTRESS, 7.—TRESPASS, 8, 9, 10.)

### FINE.

(See COPYHOLD, 11.—FORFEITURE, 1.—JOINTURE, 1.—MERGER, 3.—POWER, 9, 14.)

- 1 The passing of a fine cannot be stayed after payment of the king's silver. 78
- 2 Commissioners fined for taking the acknowledgment of an infant, *ætat.* 13. 78
- 3 A fine of a "fourth part," without saying into how many parts to be divided, is well enough: *secus*, in a writ. 158
- 4 When husband and wife join in a fine of the wife's land, the law notices from whom the estate passes. *ib.*
- 5 Purchaser without notice of a decree may plead a fine and nonclaim in bar of execution of the decree. 311
- 6 An use at common law is barred by a fine of the land. 312
- 7 A fine of the land does not bar a rent issuing thereout. *ib.*
- 8 If one of several conusors of a fine dies before the return of the writ, it is erroneous as to all. 386
- 9 *Feme covert* levies a fine of her own lands; the entry of her husband into part will avoid the whole. 396
- 10 A tenant for life, remainder in tail to B., remainder to C. for life: A. and C. levy a fine *sur concessit*, granting *totum jus et omne quod habent* to D., *habendum* for the lives of A. and C., and the survivor of them: *quære*, whether the fine passed an entire estate in possession, and thereby displaced the remainder in tail; or whether it passed their several estates by fractions? 423 & n. (a)
- 11 A fine *sur concessit* by tenant for life is a forfeiture, when executed. 424
- 12 Fine *come cro* levied by tenant for life to remainder-man for life, is a forfeiture of both estates. 434-5 & n. (a)
- 13 Where tenant in tail, with reversion in himself in fee, makes a reversionary lease and dies, a fine levied by issue in tail lets in the reversion and confirms the lease. 503-4
- 14 Death of conusor of fine before return of *dedimus*, and after caption, is error. 505
- 15 Writ of error to reverse a fine is not barred by lapse of five years. *ib.*

### FORBEARANCE.

(See ASSUMPSIT, 9, 18, 31, 32.—EXECUTORS, 19.—FRAUDS, STAT. OF, 6.—HEIR, 2.)

## FRAUD.

### FORCIBLE ABDUCTION.

(See INFORMATION, 3, 4.)

### FORCIBLE ENTRY AND DETAINER.

- 1 Restitution granted upon indictment for forcible detainer after traverse and before trial. 377  
But not after a plea of three years' possession. *ib.*
- 2 An indictment for a forcible entry must say "*then being the freehold of,*" &c. 522
- 3 Indictment for forcible entry quashed for want of *manu forti*. 523
- 4 Indictment for forcible entry into A.'s house, whereof he was possessed "*pro termino adhuc venturo,*" bad. 524

### FORFEITURE.

(See COPYHOLD, 4, 24 to 28.—EXECUTORS, 3.—FINE, 11, 12.—OFFICE, 10.—PARCENER, 1.—POWER, 1, 2.)

- 1 Whether an estate tail was forfeited by 13 Car. 2, c. 15. [whereby the lands, &c. of persons, excepted out of the act of oblivion, were vested in the king]? 427; See 437, n. (a)  
Admitting that it was not, whether a fine levied by tenant in tail to the use of himself in tail, &c. should let in the forfeiture? *ib.*
- 2 *Felo de se*, having a lease for years in the manor of B., kills himself in the manor of A., and the lords of both have a grant of felon's goods: *quære*, which shall have the lease? 443
- 3 When the heir may enter for a forfeiture, see 516-7

### FORGERY.

- 1 Indictment on 5 Eliz. c. 14, stating the forgery of a *writing indented* without saying that it was *sealed*, is insufficient. 374
- 2 Forgery of a recognizance is not within 5 Eliz. c. 14, unless it have the seal of the conusor. 398

### FORMEDON.

- 1 A plea of non-tenure of parcel needs not shew in what vill the lands lie. 158  
Such a plea must shew who the tenant is: *secus*, of non-tenure to the whole. *ib.*

## FRAUD.

(See EXECUTORS, 13, 72.—PRACTICE, 9.—RENT, 9.)

- 1 If one, whose estate is incumbered, encourages a purchaser, and conceals the incumbrance, this is fraudulent in Equity. 310
- 2 In debt for rent against assignee of lessee, the defendant pleads an assignment over; plaintiff may reply that the assignment was fraudulent. 465, & see n. (a)



## FRAUDS, STATUTE OF.

### FRAUDS, STATUTE OF.

(See DEVISE, 19, 26.)

- 1 A promise in consideration of marriage, made *before* the statute, held good without writing, though the action was brought *after* it. 466
- 2 A will made before the statute is not within it, though the party died since the statute. *ib.* & 542
- 3 Contract for sale of lands by parol is void, though there be a considerable part-payment. 486  
And the money paid may be recovered at law or in Equity. *ib.* & n. (a)
- 4 One of the witnesses to the publication of a will may subscribe it separately at another time. 486
- 5 Devisee under a will is not a "credible witness" to it within the statute. 510, & see n. (b)
- 6 Promise by administrator to pay debt of intestate, upon forbearance to sue, must be in writing. 532
- 7 Where a deviser wrote his will with his own hand, and sealed, but did not subscribe it; this was held a sufficient *signing* within the statute. 538  
A *mark* is a sufficient signing. *ib.*  
*Sealing* alone is enough. *ib.* *Sed vid.* n. (a)
- 8 A promise of marriage is within the statute. 541, *Sed vid.* n. *ibid.* *contra.*
- 9 Whether a codicil, written immediately under a will of land, but without a distinct signature, will revoke the devise? 541
- 10 A will written before the statute is not within it, though the deviser died since. 542

### GAMING.

- 1 A. lost 80*l.* to B. at play, for which he gave his bond; the parties then agreed to meet and play again shortly, which they did two days after, when A. lost 60*l.* more to B. for which he gave another bond. *Quære*, whether this was a loss of more than 100*l.* at one time or meeting within the statute 16 Car. 2, c. 7?  
*Semb.* if the separation had been collusive to evade the statute, the case would have been within it. 200, & see 421
- 2 If more than 100*l.* be trusted at one time at a horse race, the *whole* is lost. 358
- 3 Where distinct securities are given for several losses, each less than 100*l.*; but amounting in the whole to more; all are void by 16 Car. 2. 421
- 4 Where a party loses at one meeting more than 100*l.* altogether, by playing with several persons, it is within the statute. 432
- 5 In debt on the statute of gaming, miscasting the treble value is aided by verdict. 532

## GUARDIAN.

### GAVELKIND.

(See COPYHOLD, 2.)

- 1 Remainders and reversions of gavelkind lands descend in gavelkind. n. (b), 46
- 2 The stat. 31 Hen. 8, c. 3, for disgavelling lands in Kent, extends only to their partible quality, and not to the custom of devising or endowing the widow of a moiety. 47
- 3 The essence of gavelkind is partibility; the other customs are collateral. 48
- 4 A rent-charge newly created, issuing out of gavelkind lands, descends according to the custom of gavelkind. 105, 345
- 5 An use of gavelkind land shall follow the nature of the land. 346

### GIFT.

(See MARRIAGE, 14.)

### GLOVES.

(See PARDON, 2.—STATUTE, 11.)

### GRANT.

(See COMMON, 2.—CORPORATION, 3.—COVENANT, 12, 18.—DEED, 5 to 9.—KING, 6, 7.—OFFICE, 11.)

- 1 In the grant of a rent to commence after the decease of A. & B., with a power of distress *during their joint lives*, the latter words may be rejected. 78
- 2 A grant by the king of the advowson of the church of L. "lately belonging to the Archbishop of Canterbury," is good, although it never in fact belonged to the Archbishop. 178
- 3 Where a grant is in general words, as "*omnia illa*," &c. the subsequent descriptions of the thing granted must be true, whether it be the king's grant or that of a private person. But where the thing is ascertained by name, a false description will not avoid the grant, unless the king appears to be deceived in his title, or in the value, or in any thing relating to his profit. 178-9
- 4 The king grants a manor, "and every part and parcel, or that is reputed parcel thereof." This *reputation* is a question for the Court, and not the jury. 207  
*Semb. aliter*, in the grant of a private person. 208, C. 212, n. (a)
- 5 If the king be deceived in a consideration real executory, his grant is void: but not in a consideration personal executed. 332
- 6 Whether the interest in a thing lying in grant be determined by the destruction of the deed? See 429 & n. (b)

### GUARDIAN.

- 1 If guardian and ward join in a lease, it is the lease of the guardian till the ward is fourteen years old, and afterwards the lease of the ward. 102

## GUARDIAN.

- 2 Testamentary guardianship is not assignable or devisable. 268
- 3 A grandfather cannot appoint a guardian under stat. 12 Car. 2, c. 24. *ib.*
- 4 A brother of the half blood may be guardian in socage. 294

## HABEAS CORPUS.

(See *BARON AND FEME*, 9.)

- 1 Of the degree of certainty requisite in the return to a *hab. corp.* 2
- 2 On the form of the return when the commitment is for contempt. *n. (a), ib.*
- 3 *Hab. corp.* and *certiorari* are in the nature of a writ of error. *n. (c), 5*
- 4 *Hab. corp.* lies to remove a prisoner within the cinque ports. 12
- 5 The court of C. B. may grant a *hab. corp. ad respondendum*, or *ad faciendum et recipiendum*, but not *ad subjiciendum* at common law. 224, 253  
But see *n. (a), ibid.* as to the power of the courts of C. B., Exchequer, and Chancery to grant this writ.
- 6 Security taken from the detaining party upon a *hab. corp.* 389
- 7 A return to a *pluries hab. corp.* denying the detention at the time of, or since, the service of the *pluries*, is bad. 390, 401
- 8 Indictment lies for a false return to a *hab. corp.* 401, 522

## HABENDUM.

(See *DEED*, 6, 7, 10.)

## HEARTH-MONEY.

- 1 Whether cutlers' forges shall pay hearth-money. 354

## HEIR.

(See *ACTION*, 1.—*COPYHOLD*, 17, 18, 24, 27.—*DEVISE*, 2, 18, 34.—*REPLEVIN*, 2.)

- 1 Heir cannot recover rent due in the lifetime of his ancestor. 37
- 2 In *assumpsit* against an heir on a promise to pay his ancestor's bond debt, in consideration of plaintiff's forbearance to sue, it is unnecessary to aver assets by descent. But it must appear that the heir is chargeable by the bond. 125
- 3 In debt on bond, the heir pleaded no assets but a reversion after a lease for years: held, that plaintiff should reply assets *ultra*, or take judgment of assets *quando*, &c. 160
- 4 A reversion on a lease for years is immediate assets. *n. (a), ib.*
- 5 Whether, under a limitation to *heirs-male*, a special heir may take by purchase, though not heir general? 217, 225 & *n. (b)*
- 6 The heir may be relieved in Equity against the executor in case of assets. 301
- 7 Heir of mortgagor and mortgagee join in a sale of the lands: the money in the hands of the heir shall not be assets in Equity. 303

## IMPLICATION.

- 8 An heir special may take as a purchaser by that description, though not the heir general. *Per Hale*, C. J. 370
- 9 A man shall never make his right heir a purchaser, by the name of *heir*, without parting with the whole fee. 371
- 10 Borough English land is granted to A. and his heirs for three lives: the younger son shall have it on A.'s death. 399
- 11 The word *heir-male* may be a word of purchase in a deed, *semb.* 462 & *n. (b)*
- 12 A reversion in fee expectant on an estate tail, is, when it vests in possession, assets for payment of a bond debt of the ancestor last actually seised in fee in possession. 498
- 13 In declaring against the heir on such a bond, he may be named immediate heir to the obligor without mentioning intermediate descents of the reversion. *ib.*
- 14 Reversion on estate tail is not assets in the heir. 499
- 15 When the heir shall enter for a forfeiture committed in his ancestor's lifetime, 516-7

## HERIOT.

- 1 Of pleading a justification in trespass for heriots. 131

## HIGHWAY.

(See *WARRANT*, 2.)

- 1 To carry too heavy loads on the highway is indictable at common law. 100
- 2 Clergy are chargeable to the repair of highways. 396, 491
- 3 He who keeps several teams in a parish shall send all to repair the highways, though he have no plough-land. 420, 490, 491
- 4 A parish indicted for non-repair of highways cannot, under a plea of *not guilty*, shew that another parish, person, or precinct is bound to repair. 521
- 5 Indictment of a particular person or precinct for non-repair must shew a liability by prescription or tenure. 522

## HOMICIDE.

- 1 A. & B. engage in a quarrel with C. & D.; A. fights with C., and B. with D.; A. kills C.; B. is equally guilty of manslaughter with A. 514

## HUNDRED.

(See *INFERIOR COURT*, 10, 14, 15.—*LEET*, 2, 3, 4.)

- 1 What hundreds were annexed to the sheriffwicks by 14 Ed. 3, c. 9? 204

## IMPLICATION.

(See *DEED*, 4.—*DEVISE*, 1, 2, 3, 13, 33.—*USE*, 5.)



## IMPROPRIATION.

### IMPROPRIATION.

(See CHURCH, 10, 11, 12.)

### INDICTMENT.

(See AMENDMENT, 1.—CONSTABLE, 1.—FORCIBLE ENTRY, 2, 3, 4.—FORGERY, 1.—HABEAS CORPUS, 8.—HIGHWAY, 1, 4, 5. SHERIFF, 8.—SLANDER, 43.)

- 1 An indictment lies upon prohibitory words in a statute, although it also limits a penalty and a particular manner of recovering it. 393
- 2 It is unnecessary to allege in an indictment that the prosecution was commenced within a time limited by statute. 406
- 3 As to naming and describing jurors in an indictment, 522
- 4 Indictment at Sessions quashed for not naming the county. *ib.*
- 5 Indictment for nuisance bad for omitting time, or *contra pacem*. 523
- 6 *Vi et armis* unnecessary in indictments for cheating. *ib.*
- 7 Judgment in indictment, for using trade without serving as apprentice, reversed for saying "*ideo committatur ad gaolam*," instead of "*ideo forisfaciat*." 524

### INDUCTION.

(See CHURCH, 20.)

### INFANT.

(See AWARD, 3.—COPYHOLD, 17, 18.—DEVISE, 17.—EJECTMENT, 3.—EXECUTORS, 66.—FINE, 2.—LEASE, 17.—SURRENDER, 1.)

- 1 Infant is bound by a condition annexed to his estate. 32 & n. (b)
- 2 A submission bond and award, binding an infant and another, may be voidable as to the infant and valid as to the other, if the act to be done by the other be distinct. 63, 139
- 3 If an infant and one of full age seal a bond, it is voidable as to the infant and valid as to the other. 139, 140
- 4 *Indebitatus* for a horse sold; plea, infancy; replication, that it was sold to carry defendant about on necessary business; demurrer: held, that the demurrer admits the necessity, and that judgment must be for plaintiff. 531  
That the question of *necessaries* or not, is a mixed one of law and fact,  
*See n. (a), ib.*

### INFERIOR COURT.

(See COSTS, 5.—ERROR, 2, 5, 9 to 16, 22.—PRESCRIPTION, 8, 12.—SEWERS, 1.)

- 1 Pendency of action in inferior court not

## INFERIOR COURT.

pleadable: *aliter* of a recovery there.

- 6, C. 4, & n. (b)
- 2 Court baron may be holden before the steward by prescription. 19 & n. (a)  
*See also* 316
- 3 Justification by officer of inferior court under a *distringas ad resp.* is good without averring a plaint entered. But it must shew the process returned. 19
- 4 Whether the want of a plaint makes the process void or erroneous only? *ib.* & n. (b)
- 5 Custom in inferior court to take the bail upon default made by the principal, without a previous *scire facias*, is good. 63
- 6 *Quare*, if a custom to take the bail without a previous *capias* against the principal, be good? *ib.*
- 7 *Indebitatus* count for goods sold, in an inferior court, must allege both the sale and the promise to have been within the jurisdiction. 104, 321
- 8 In an action for an escape against the officer of an inferior court by the plaintiff below, the officer may shew that the original cause of action arose out of the inferior jurisdiction. 193
- 9 If the kind of action be cognizable in the inferior court, the officer is not liable to an action for executing the process of the court, though the cause of action arose out of its jurisdiction. *ib.*
- 10 The title of the owner of a hundred court cannot be questioned in an action of trespass against the officer for executing its process. 204
- 11 So where a disseisor is the *dominus pro tempore* of a manor, the officer may execute the process of the court-baron. *ib.*
- 12 *Assumpsit* on a special promise to pay rent lies not in an inferior court. 214
- 13 A *quantum meruit* for work done out of the jurisdiction of an inferior court will not lie, although the promise be within it. *ib.*
- 14 A plea in trespass, justifying under process of an hundred court, must allege that the cause arose within its jurisdiction. 260  
As to the distinction between a justification by the officer of the Court and by the party, *See n. (a), ib.*
- 15 In trespass for taking goods, a justification by attachment out of an hundred court must allege the *locus in quo* to be within the jurisdiction. 266
- 16 In action on a bond in the Norwich Court, the plea *non dedicit factum sed inquiratur de debito* is good by custom. 281
- 17 After verdict against the defendant in an inferior court for a cause of action alleged to be within its jurisdiction, no prohibition lies on a suggestion that it arose out of it. 294

## INFERIOR COURT.

18 Where it appears upon the proceedings in an inferior court that it has no jurisdiction, or where from the nature of the cause it can have no cognizance, a prohibition lies at any time.

But where the want of jurisdiction is by reason of time or place, the defendant below must plead it. 295

If the defendant be prevented from pleading to the jurisdiction by the artifice of the plaintiff, or if the plea be refused or overruled, prohibition lies. n. (a), *ib.*

19 Out of what courts an appeal lies into Chancery, 312

20 Special damage must be laid within the jurisdiction of inferior court. 314

21 Nothing shall be intended out of the jurisdiction of a superior court, or within that of an inferior one. *ib.*

22 *Capias* may issue before summons, by custom of inferior court. *ib.*, 320

23 *Semb.* the style of an inferior court must shew its authority. 315

24 On the form of pleading a justification by process out of the county court of Lancaster. *ib.*

25 No action lies against the officer of an inferior court for executing process, which issued irregularly; if the court can make out such process, and has jurisdiction of the cause. 317

26 In *indebitatus* for money lent, both the lending and promise must be laid within the inferior jurisdiction. *ib.*

27 Irregular issuing of *capias* in inferior court is cured by appearance. 318

28 Whether in a real action in an inferior court, the lands must be laid to be within its jurisdiction. 319

29 Trespass does not lie against an officer for seizing plaintiff's goods under the mesne process of an inferior court, although the cause of action in the court below arose out of its jurisdiction, unless the party appeared and pleaded to the jurisdiction. 320

30 *Quære*, whether trespass lies in such case against the plaintiff in the suit below? *ib.* & n. (c)

31 *Semb.* case lies against a party for suing in an inferior court, and attaching plaintiff's goods, knowing that he had no cause of action within its jurisdiction. 320, 321

32 By the custom of inferior courts, goods attached are forfeited on non-appearance, if the party was summoned. 321

33 A custom in an inferior court to detain goods attached till the owner gives security to satisfy the plaintiff's debt, is bad. *ib.*

34 The party to the suit in an inferior court cannot justify under a recovery there and process of execution, if the cause of action arose out of the jurisdiction, although

## INQUEST.

the defendant below appeared and pleaded to the merits. 322

35 But the officer of the court may justify, if the declaration below *alleged* a cause of action arising within the jurisdiction; otherwise not. *ib.*

36 The admission of the party cannot give jurisdiction to an inferior court, nor estop him from afterwards denying it.

*ib.*, 323 & n. (b)

37 A transitory action lies not in an inferior court, unless the cause really arose within its jurisdiction. 324

38 Plea by officer justifying by customary process of inferior court, must shew that the custom was pursued. 356

If he pursues the custom, he is excused, though the custom be bad. *ib.*

39 An inferior court cannot hold plea of freehold, as of dower, by bill. 361

40 Want of summons in inferior court is cured by appearance. 468

## INFORMATION.

(See AMENDMENT, 1.)

1 Whether an information lies in the K. B. upon statute 22 Car. 2, c. 12, for using more than five horses on the highway? 100

2 Whether an information lies in K. B. upon the statute for selling with wrong measures? 409

3 Information lies in the K. B. for the forcible abduction of a female contrary to 4 & 5 P. & M. c. 8. 444

4 The information alleged that defendant, *being* of above the age of fourteen, took her away, &c.: held, that *being* related to the time of taking. *ib.*

5 An information *qui tam* for not going to church may conclude *contra formam statuti*, though there be several statutes. 482

6 Such an information lies in the courts at Westminster. 483

## INNS.

1 At the common law, any man might have set up an inn. 89

## INNUENDO.

(See SLANDER, 43.)

## INQUEST.

(See ALIEN, 4.)

1 Coroner's inquest finding *felo de se* is traversable: *aliter*, if *fugam se* it be found. 419, 443

2 Justices of peace at sessions may inquire of the death of a man, where the body cannot be found. 419, 420

3 Inquisition quashed for saying "*se emer-sit.*" 522

## JOINDER.

### JOINDER.

[See ACTION, 4.—BARON AND FEME, 1.—CARRIER, 3.—EXECUTORS, 57.—PRIVILEGE, 4, 6.—QUARE IMPEDIT, 7.—SURVIVORSHIP.—TROVER, 2.)

### JOINT-TENANT.

(See RELEASE, 9.—TROVER, 4.)

### JOINTURE.

- 1 A lease for years by jointress in tail is not void by stat. 11 Hen. 7, c. 20. 487  
*Semb. aliter* if created by fine. *ib.*  
*Semb.* a rent granted by fine out of the lands would be void by the statute. *ib.* & n. (b)

### JUDGE.

- 1 Judge must go *secundum allegata et probata*, notwithstanding his private knowledge. 4
- 2 A spiritual judge cannot, any more than a judge of assize, &c. proceed against a party *ex officio*. 283

### JUDGMENT RECOVERED.

(See ACTION, 7.—EXECUTORS, 8, 9, 34, 86, 37, 72.—INFERIOR COURT, 1.)

### JURY.

(See CONTEMPT, 3.—INDICTMENT, 3.)

- 1 Petit jurors are not finable for giving a verdict contrary to the evidence, and the direction of the court. 1
- 2 Power of fining for false verdict in the Star-chamber. 4 & n. (c)
- 3 Jurors not punishable or responsible in their judicial capacity: *aliter* in their ministerial character. n. (h), 5
- 4 May be guided by their private knowledge. *ib.* & n. (h)
- 5 Verdict for plaintiff set aside, because the jury eat at his charge, notwithstanding his death since the verdict. 79
- 6 The misconduct of jurors is included in a general pardon. 80
- 7 After verdict the jury shall not be presumed to have given damages for a thing *naturally* impossible: *aliter*, if only *legally* so. 83
- 8 A verdict finding an indorsement or recital in a deed, is no finding of the thing indorsed or recited. 180, 528
- 9 A verdict is sufficient, if it finds the substance of the issue. 189
- 10 Jury cannot find any thing contrary to the admission of the parties. *ib.*
- 11 The Court will not regard the intent of the parties to a conveyance, as found by the jury. 228

## KING.

- 12 Whether the Court be bound by the special conclusion of a verdict? 252
- 13 Presentment of a jury is not always necessary to put a party to answer a criminal charge. 283, C. 326, n. (a)
- 14 A custom to try by six jurors in an inferior court is good. 318, *Sed vid.* 317, 322
- 15 New trial granted where the jury threw dice. 414-5
- 16 So where the party gave to the jury evidence which had not been read in court. *ib.*
- 17 When a special verdict cannot be helped by intendment, 450
- 18 If the jury find a deed with a recital, this is no finding of the matter recited. 528

### JUSTICES.

(See INQUEST, 2.—WARRANT, 3.)

- 1 On the jurisdiction of justices of gaol delivery where the party is at large. 349
- 2 The justices at sessions may commit a fellow justice for refusing to find sureties of the peace on the complaint of a third party. 354
- 3 Warrant of justices, though irregular, protects the officer, if they have jurisdiction of the matter. 396
- 4 Justices of oyer and terminer may try on the day of indictment: *aliter* of justices of the peace. 406

### JUSTICIES.

- 1 An excessive seizure of goods under a *justicies* held illegal, and the bailiff committed. 373

## KING.

(See CHARITY.—CHURCH, 8, 9, 14.—DISPENSING POWER.—GRANT, 2, 3, 4, 5.—PLEADING, 5.)

- 1 There is no privilege, against the king's process. 12 & n. (a)
- 2 The king, upon granting over a rent-service, cannot empower his grantee to distrain. 37
- 3 When the maxim *nullum tempus*, &c. does not apply, *See* 41, *arguendo*.
- 4 King's privy signet transfers no interest. 70
- 5 On the determination of offices by the king's demise. 70-1
- 6 The king may grant an annuity, chargeable upon his hereditary revenue, so as to bind his successors; and the grantee has a remedy for arrears by petition to the barons of the Exchequer. 331-2
- 7 The king cannot grant his kingdom, nor put it in vassalage or subjection to another. 332

## KING.

- 8 The king cannot charge his person. 392  
9 As to the remedy of the subject to recover pensions, &c. from the crown,  
See 332-3 & n. (b)

## LANDLORD AND TENANT.

(See LEASE.)

## LAPSE.

(See CHURCH, 2, 5.)

## LEASE.

(See BISHOP, 2 to 11.—COVENANT, 13.—DEED, 9.—EXECUTORS, 80.—GUARDIAN, 1.—JOINTURE, 1.—POWER, 3, 4, 7, 8, 12, 13, 15, 16.)

- 1 J. S. seised in fee leases for years reserving rent "during the term to the said J. S. his executors and administrators, &c." The rent is not determined by the death of J. S., but follows the reversion. 16
- 2 General rules respecting the reservation of rent. *ib.*
- 3 A reservation shall not be construed so strictly as a grant. 17
- 4 On the effect of a reservation to one or his heirs &c. *ib.* & n. (c)
- 5 On the utility of adding the words "*during the term.*" *ib.* & n. (d)
- 6 A lease for years, "so long as the lessee shall duly pay the rent," makes a limitation, and not a condition; and so no demand of rent is requisite to avoid it. 23, 24; *Sed vide* 414
- 7 A lease at will is not determined by a parol lease for years to a third person to begin immediately, with an agreement not to enter till the rent has become due from the tenant at will: *aliter* if the lease for years be in writing. 106
- 8 If the lessee at will sows the land before notice that the lessor has determined his will, he shall have the crop. 107
- 9 Words spoken by the lessor to his bailiff will not determine a lease at will, without notice to the lessee. *ib.*
- 10 Bargain and sale by lessor determines a lease at will, upon notice to the lessee. *ib.*
- 11 Rent is reserved in a lease without deduction in respect of parish duties, dues, taxes, &c. made or to be made &c.:" a subsequent act imposes a tax to be paid by landlords with a proviso saving covenants between landlords and tenants: *quare*, whether the tenant may deduct payments made under the act? 148
- 12 Wife tenant in tail of B. acre and W. acre, each usually let for 10s. rent *per annum*: Husband and wife let both to-

## LEASE.

- gether by indenture at an entire rent of 20s.: Husband dies; wife accepts rent, and then enters; *quare*, whether her entry be lawful? 187
- 13 Where lands of a dean and chapter have been usually let excepting the woods and underwoods, and allowing the tenant sufficient bote and estovers; a lease without such exception is not binding though the woods had been so wasted at the time of the demise as not to leave sufficient bote, &c. 232
  - 14 Allowance of bote in a lease enures by way of covenant, and does not pass the wood. 233
  - 15 Where two tenants in common join in a lease, it operates as the several lease of each, and the confirmation of the other, and it cannot be pleaded as a joint demise. 235
  - 16 When a lease for years is made to be void on non-payment of rent, an actual demand is necessary to avoid it: *aliter*, if to be void on non-payment of a sum in gross. 242
  - 17 Lease of an infant, with a pepper-corn rent, is void. 251 & n. (b)
  - 18 If remainder-man in tail, with remainder in himself in fee, makes a lease for years, it is good against the heir in fee; and if the lessor suffers a recovery, it is good against the issue in tail. 310
  - 19 Death is not such a non-residence as will avoid a parson's lease. 340
  - 20 A reservation of rent in a parson's lease payable on the quarter days, or within twenty days after, is good, and binds the successor; and the tenant shall not have twenty days after the last quarter day. *ib.*
  - 21 A concurrent lease by a parson, to commence at a future day, is a lease in reversion and void against the successor. *ib.*
  - 22 What shall be a non-residence to avoid a parson's lease. 341
  - 23 If rent in a parson's lease is payable at Mich. or within twenty days after, and the parson dies on the day after Mich., the successor shall have it. 342
  - 24 A lease in reversion is either a concurrent lease, or a lease to begin in *futura*. *ib.*
  - 25 *Quare*, whether a concurrent lease by a parson, to commence presently, be a lease in reversion within the statute? *ib.* 343 & n. (c)
  - 26 Whether stat. 18 Eliz. c. 11, extends to leases within 14 Eliz. c. 11, concerning houses in market towns? 342-3
  - 27 *Semb.* a lease containing the words "the lessee paying his rent," or "so long as lessee shall pay his rent" is not avoided by non-payment. 414, *Sed vide* 23-4
  - 28 Under a lease of land, not mentioning

## LEASE.

~~mines~~, the lessee cannot open new ones. 445

29 *Semb.* where mines are mentioned, and there are open ones on the land, lessee cannot open new ones. *ib.*

But new shafts may be sunk. n. (a), *ib.*

30 Lease at will to two is not determined by death of one. 450

31 Leases sealed by the majority of the dean and prebendaries *resident at the time*, are generally good by usage. 505

32 A lease cannot operate by estoppel, where it appears by recital that the lessor has no estate. 528

33 A conveyance, limited to commence after an existing lease, takes effect presently if that lease be void, *semb.* 529

## LEASE AND RELEASE.

(See MERGER, 2.—POWER, 11.—USE, 1.)

1 A lease and release may be in the same deed, and priority of the lease shall be supposed. 251 & n. (a)

## LEET.

(See COURTS, 12.—OFFICE, 15.)

1 A presentment in a leet for a personal misdemeanor, or in a swainmote for vert or venison, is a conviction, and conclusive; but if for a nuisance or concerning the freehold, it is traversable. 339

That a presentment, though not traversable in the leet, may be disputed by removal into the K. B. by *certiorari*, or by an action, *See S. C. n. (b)*, 340

No *certiorari* lies, after the fine has been estreated and paid. *ib.*

2 Residence within the leet of an antient borough will not exempt a man from the office of constable of the hundred. 348

3 When an inferior leet omits its duty, the leet of the hundred has jurisdiction. *ib.* 349

4 A hundred-leet granted to a subject is a franchise. *ib.*

5 Presentment in a leet for false weights must shew they were used in trade, and within the jurisdiction of the court. 524

## LEGACY.

(See BARON AND FEME, 5.—BOND, 17.—COURTS, 10.—DEVISE, 11, 30, 35.—EXECUTORS, 23, 46, 47.)

1 Legacy of 20*l.* to A. "when he shall come to the age of 21" lapses by his death during minority: *aliter*, if it be a legacy "to be paid to A. *at* (or *when* he comes to) the age of twenty-one." 420-1

## LUNATIC.

2 An action lies against a *terre-tenant* for a legacy devised out of land. n. (b), 481

## LIBEL.

(See SLANDER.)

## LICENCE.

(See COMMON, 4, 5, 6.—DEBT, 7.—DISPENSING POWER, 1.—PLEADING, 41.)

1 Bare licences or authorities are determinable by the death of the grantor: *aliter*, where an interest is coupled with them, or the licence is executed. 88, 117, 332

2 A licence, pleaded indefinitely, shall be presumed to continue, unless the contrary appear. 120

3 A licence coupled with an interest is irrevocable. 332

4 In trespass, defendant pleaded a licence "to him, for himself, wife, and children." Replication, no licence "to him and his wife *modo et forma*:" after verdict for plaintiff, a replender was awarded. 450

5 Licence to "A. and his wife" to enter, survives to the wife: *secus* of licence to A. to enter *with* his wife. *ib.*

## LIMITATION OF ACTIONS.

(See FINE, 15.—INDICTMENT, 2.—KING, 3.)

1 Stat. of limitations is no ground of motion in arrest of judgment. 7

2 On *assumpsit* to pay money at a future time, *actio non accrevit infra sex annos* is the proper form of plea. 22

3 The proviso in stat. limitations 21 Jac. 1, c. 16, saving the rights of infant plaintiffs, extends to actions of *assumpsit*. 208

4 Every trader is a merchant within the exception of the stat. limitations: *per Scroggs, J. ceteris dissentientibus*. 230

5 Actions on the Case are within the exception of the stat. limitations respecting merchants' accounts. 234

6 Debt against the sheriff for money levied to the plaintiff's use under a *fi. fa.* is not within the stat. limitations. 237

7 *Indebitatus assumpsit* on an account stated is barred by stat. limitations. 242

Where a sum, found due on an account stated, is suffered to run on in a further account, it again becomes part of an account current. *ib.*

8 An original trust is not barred in equity by the stat. limitations. 301

9 Stat. limitations, if pleaded specially, must be rightly entitled. 311

10 The Court refused to notice in what year of King James's reign over Scotland the stat. limitations was passed. *ib.*

## LUNATIC.

(See SURRENDER, 2.)



## MAINTENANCE.

### MAINTENANCE.

(See ASSUMPSIT, 3.—BOND, 1.)

- 1 Unlawful maintenance must be specially pleaded to an action on a bond. 81
- 2 An attorney may take security from a stranger for *past* expences in a suit *inter alios*; but *semb.* not for *future* expences. *ib.*
- 3 An attorney may lay out his own money for his client. 82
- 4 A client may give his attorney a bond for his future fees. *ib.*

### MALICIOUS PROSECUTION.

(See ACTION ON THE CASE, 2, 8.)

### MANDAMUS.

(See CORPORATION, 5.—EXECUTORS, 58.)

- 1 *Mandamus* lies to restore a sexton; or for the office of steward of a court-leet, or baron; or constable, parish clerk, churchwarden, or fellow of a college. 21, & notes *ib.*
- 2 *Mandamus* lies to swear a churchwarden. 366
- 3 *Mandamus* lies to prove a will. 374

### MARKET.

- 1 The inhabitants of one market town are not prohibited by 1 & 2 Phil. & Mar. c. 7, from selling in another market town. 344
- 2 If owner of stolen goods prosecutes the felon to conviction, he shall have restitution, notwithstanding a sale in market overt. 460

### MARRIAGE.

(See ACTION, 6.—ASSUMPSIT, 8, 10, 28.  
BARON & FEME.—CONDITION, 4.  
FRAUDS, STATUTE OF, 2).

- 1 On the remedies in the Courts of common law and in the spiritual courts upon promises of marriage; and where the proceedings in one will defeat the other. 66, C. 78, & n. (a)
- 2 Marriage was not antiently of spiritual cognizance. 95, *Sed vide* 167
- 3 Marriage is one of the strongest considerations in law either to raise an use or to found a contract. 96
- 4 What contracts of marriage can be enforced by the canon law. n. (b), *ib.*
- 5 The fact of marriage is sometimes triable by jury. *ib.*
- 6 The Levitical law of marriage would not have bound us, but for the act of parliament. 142
- 7 A man may not marry the sister of his deceased wife. 167
- 8 The temporal courts never prohibited the

## MORTDANCESTOR.

Ecclesiastical courts in causes of marriage till 32 Hen. 8, c. 38. *ib.*

- 9 The practice of the Hebrews is a good precedent in the construction of the Levitical law. *ib.*
- 10 In Leviticus, *near* of kin means *next* of kin. 168
- 11 A marriage may be unlawful, yet indissoluble. 169
- 12 The Levitical *prohibitions*, and the Levitical *degrees*, distinguished. 170
- 13 A marriage, voidable for affinity, is unimpeachable after the death of either party. n. (g), 171
- 14 Where a man gives jewels to a woman during courtship and in contemplation of marriage, if the match is broken off, he is entitled to restitution. 214 & n. (e)
- 15 Whether a man may marry his wife's sister's daughter? 287
- 16 Where, by articles made upon a marriage, a settlement is a condition precedent to the payment of a portion, if the wife die before the settlement made, the husband can have no relief in equity as to the portion. 302-3
- 17 A man shall not marry his wife's sister's daughter. 511

### MAYHEM.

(See PRACTICE, 4.)

### MERGER.

(See EXECUTORS, 35.)

- 1 If one, who has a term of years as executor, purchases the reversion, the term is extinguished: *aliter*, if the reversioner acquires the term by executorship. 289 & n. (a)
- 2 Lessee for years and a stranger accept a lease and release to uses: the former lease is not thereby extinguished or surrendered either for the whole or in part. 384-5
- 3 A fine levied to lessee for years, to make him tenant to the *præcipe*, will not merge the term. 412
- 4 Term of years in executor is not extinguished by his taking a grant of the reversion. 513, *Sed vide* 289

### MINES.

(See LEASE, 28, 29.)

### MISCASTING.

(See GAMING, 5.)

### MISRECITAL.

(See PLEADING, 72.—VARIANCE, 19.)

## MORTDANCESTOR.

- 1 Assise of mortdancestor lies not of de-



## MORTGAGE.

Visable lands, nor of rents, issuing there-out. 346

## MORTGAGE.

(See HEIR, 7.—RELEASE, 8.)

- 1 The rule as to the calculation of interest on the assignment of a mortgage. 303
- 2 A. mortgaged to B. in trust for C., and then confessed judgment to D., and afterwards mortgaged again to C.: the judgment creditor D. was allowed to redeem on payment of the first mortgage only. 331, *Sed. quære?*

- 3 A. makes a lease with condition to be void on payment of money: a bond by A. conditioned to perform "all covenants and conditions in the lease" is forfeited by non-payment. 386

*Aliter*, if the condition be to perform all covenants, or payments; unless the mortgage deed contains a covenant to pay.

n. (a), *ib.*

Where mortgage contains no covenant to pay, payment cannot be compelled by action. n. (a), *ib.*

*Aliter*, if there be a precedent debt, or if it be a pledge of personalty. n. (a), *ib.*

## NEW ASSIGNMENT.

- 1 Where the plaintiff new assigns a trespass in a different place, he should conclude with a verification only, without praying judgment for not answering the trespass newly assigned. But it is only form. 238 & n. (a)
- 2 There is no new assignment as to place in replevin. *ib.*
- 3 In trespass for taking goods, the plaintiff may new assign. *ib.*

## NOLLE PROSEQUI.

- 1 *Nolle pros.* in inferior court is a bar. 6, C. 4, & n. (c)

## NONSUIT.

(See COSTS, 7.—EJECTMENT, 3.—PLEADING, 22.—REPLEVIN, 5.)

## NOTICE.

(See ACTION ON CASE, 12.—CHURCH, 2, 5, 13.—CONDITION, 2.—EXECUTORS, 12.—FINE, 5.—LEASE, 8, 9, 10.—PROHIBITION, 8.—WAGER, 2.)

- 1 In assumpsit on a promise to save harmless the vendee of certain goods, the declaration states a recovery by a stranger: allegation of notice to defendant is unnecessary. 130
- 2 Notice must be alleged of a thing which lies particularly and solely in the knowledge of the party which is to take advantage. 130, 254

## OFFICE.

- 3 Debt on bond conditioned to give notice to obligee; plea, that defendant gave notice according to the form and effect of the condition, held bad for not shewing how. 247

- 4 Defendant, on the sale of a parcel of wood to plaintiff, covenants that "if the said wood does not on measure amount to forty acres, he will make it up, &c.": plaintiff declares on the covenant, alleging that the parcel did not amount to forty acres: an averment of notice to defendant is unnecessary. 254

- 5 When a thing lies as much in the notice of defendant as of plaintiff, defendant shall take notice at his peril. 285

## NUSANCE.

(See ACTION ON CASE, 5, 6.—INDICTMENT, 5.—LEET, 1.—PLEADING, 56.)

- 1 In Case for a nuisance to a house the plaintiff in his declaration states a seisin in right of his wife, and demands damages for an injury to the inheritance: *quære*, if the action be maintainable in this form without joining the wife? 236

## OATH.

(See ASSUMPSIT, 7, 17.—BAILIFF, 1.—CHURCHWARDENS, 2, 3.—OFFICE, 13.)

- 1 Of the power of a justice of the peace to administer oaths. 133
- 2 On the legality of extrajudicial oaths. *ib.*
- 3 A bishop may swear *visis evangelis*, instead of *tactis*. *ib.*
- 4 An Irish knight has the same privilege of not being put to his oath, as an English one. 249
- 5 An ecclesiastical judge cannot put any one to accuse himself on oath. 283
- 6 A party, libelled in the Ecclesiastical Court for repairs of a church, is compellable to answer on oath: *aliter*, in criminal matters. 296
- 7 A peer, called as a witness, must be sworn. 422

## OCCUPANCY.

- 1 Title by occupancy is not aided in equity. 313
- 2 *Semb.* an executor cannot be special occupant of an estate *per auter vie* at common law. 395

## OFFICE.

(See COVENANT, 1.—CORPORATION, 4, 6.—ESCAPE, 4.—KING, 5.—MANDAMUS, 1.—SHERIFF, 3, 11.)

- 1 Bond for the sale of the place of undersheriff is void by statute 5 & 6 Ed. 6. 19
- 2 An officer (A.) grants a dependant office, with a covenant for enjoyment as long as A., or any claiming under him, shall

## OFFICE.

- exercise the superior office, and also a covenant not to revoke or annul his grant: a surrender of the superior office by A. is no breach. 20, 21
- 3 Office of under-searcher granted "*durante beneplacito*," determines on the king's demise. 70
- 4 A suit concerning the office of register in the Spiritual Court must be brought in the courts of common law. 130
- 5 The 5 & 6 Edw. 6, c. 16, on the sale of offices, does not extend to Barbadoes. 175
- 6 All the coroners of the county-palatine of Lancaster make but one officer. 191
- 7 To an information for exercising the office of sheriff without receiving the sacrament, it is no defence that the party is disabled to receive it by excommunication for disobedience to the sentence of the Spiritual Court. 327
- 8 The office of register may be granted for three lives, whether the bishopric be an old or new one, if it was usually so granted before 1 Eliz. c. 19. 394-5
- 9 The bailiwick of a liberty is not an office within 5 & 6 Ed. 6, c. 16. 428
- 10 An office granted by deed is not lost by the destruction of the deed, if it can be proved. 429
- Quære*, when the cancellation is by consent? n. (b), *ib.*
- Whether the interest in things lying in grant be determined by the destruction of the deed of grant, *see* n. (b), *ib.*
- 11 When an entire office is held by two, the surrender or forfeiture of one redounds to the benefit of the other. *ib.*
- 12 Office of clerk of the papers cannot be exercised by deputy. *ib.*
- 13 An officer must take the oaths agreeably to the corporation act, at his peril, although they be not tendered to him; and in default thereof his election is void, and not voidable only. 475-6; *and see* n. *ib.*
- 14 *Indebitatus assumpsit* lies at the suit of one entitled to an office against an usurper, who has received the fees. 478
- 15 *Quære*, whether the stewardship of an honour, containing a court-leet and court-baron, may be granted in reversion? *ib.*
- That the grant is good as to the court-baron, *See* n. (c), 479
- Semb.* a judicial office in an inferior court, exercisable by deputy, and requiring no personal attendance, is grantable in reversion. n. (c), *ib.*
- As to trial of titles to offices by action for money had and received, *See* n. (d), *ib.*

## OUTLAWRY.

- (*See* ACTION, 1.—CINQUE PORTS, 3.—ERROR, 8, 19.—PENAL STATUTE, 2.—PRACTICE, 3.—VENUE, 1, 2.—WALES, 5.)
- 1 Outlawry reversed because the day of

## PARISH.

- holding the court was in figures. 358
- 2 If one be taken on a *cap. utlag.* after judgment, the party may elect to consider him in execution without prayer: *semb.* *ib.*
- 3 After outlawry for felony and a pardon, the outlaw or his heir must reverse it by writ of error, in order to recover lands escheated. 369
- 4 Outlawry reversed, because the return to an *exigent* against two was *quod non comparuerunt*, omitting *nec aliquis eorum*. 525
- 5 Outlawry reversed, because the return to *exigent* did not shew that the place of holding the court was in the county. *ib.*

## OYER.

(*See* PLEADING, 32.)

- 1 Demand of oyer is no plea; and therefore a demurrer thereto *quia placitum predict' minus sufficiens*, &c. was held bad, and a repleader awarded. 400 & n. (a)
- Plaintiff may demur or counterplead to the demand of oyer. n. (a), *ib.*
- 2 No oyer after imparlance [to another term]. *ib.* & n. (b)

## PARCENER.

(*See* COPYHOLD, 24.—ERROR, 27.)

- 1 One coparcener cannot enter for her moiety on a forfeiture, but they must both agree. 516

## PARDON.

(*See* CHURCH, 8, 9.—DISPENSING POWER, 6.—JURY, 6.—OUTLAWRY, 3.—PLEADING, 33.—SIMONY, 2.)

- 1 A general pardon is not available on error. 84
- 2 A general pardon intervened between the time of importing gloves contrary to 3 Ed. 4, c. 4, and the time when they were found in defendant's hands for sale: *quære*, whether the pardon discharged the forfeiture? 325
- 3 The king may pardon murder as well since as before the bill of rights: but *semb.* not by general words. 501
- 4 A writ of allowance is necessary in a pardon of murder. 502. *Sed vide* n. (b), *ib.*

## PARISH.

(*See* POOR, 2, 3.)

- 1 A parish was originally only an ecclesiastical division, not noticed by the common law, nor used in writs. 228
- 2 Where a place is mentioned in a recovery simply by its name, it shall be intended to be a *vill*, unless it appear that a *parish* is meant. *ib.*

## PARLIAMENT.

### PARLIAMENT.

(See ACTION ON CASE, 10, 11.—BAIL, 9.—  
ERROR, 18.—SHERIFF, 11.)

- 1 Persons duly elected to serve in parliament are punishable for refusing. 388
- 2 When the judges may determine matters relating to parliament, See 431 & n. (d)
- 3 On the remedy for false or double returns, See n. (g), 432
- 4 Session is not ended by royal assent to bills. 455

### PARSON.

(See CHURCH.—LEASE, 19, 20, 21, 22, 23, 25.)

### PARTITION.

(See DEVISE, 40.)

- 1 Partition may be made by the under-sheriff. 53
- 2 Partition may be made by tenants in common, though one of them have made a lease for years. 542
- 3 Partition is no revocation of a devise. 542 & n. (a)

### PAYMENT.

(See BOND, 16.—EXECUTION, 8, 9.)

- 1 Payment is no plea to matter of record. 453
- 2 Payment *before* the day is payment *at* the day appointed. 526

### PENAL STATUTE.

(See DEBT, 6, 7.)

- 1 Information on a penal statute, exhibited in the proper county, may be removed by *certiorari*. 65
- 2 In debt *tam quam* on a penal statute, outlawry of the informer is a good plea: but the king may proceed for his share. 235
- 3 In an information on a penal statute, it is no plea that the informer was not sworn. 376
- 4 In debt on a penal statute, a plea of *another action pending* must shew that it was pending before the commencement of the present. 400
- 5 Actions on penal statutes, which do not lie before justices in the county, where the offence was committed, may be brought in the courts at Westminster. 534

### PERJURY.

(See SLANDER, 5, 15.)

- 1 Perjury, whether by stat. 5 Eliz. or at common law, must be in a material point. 506
- 2 Perjury within 5 Eliz. must be committed in a court of record, or other court mentioned therein: *secus*, of perjury at common law, which may be in a court not of record. *ib.*

## PLEADING.

- 3 No indictment lies for perjury in wager of law, or swearing a foreign plea. 523  
*Sed quære? vide n. (a), ib.*

### PETITION OF RIGHT.

- 1 Lies as well for a *personal* as a *real* due. 333

### PLEADING.

- 1 *Licet* is a sufficient averment. 6 & n. (c)
- 2 Stat. limitations is no ground for a motion in arrest of judgment. 7
- 3 Action of *debt* in a simple contract against executor is no ground for arresting judgment. *ib.*
- 4 A traverse upon a traverse cannot be taken by a common person; *ib.*
- 5 Nor by the king, unless he be in possession, or his title appear by matter of record, when he may either maintain his own or traverse defendant's title. *ib.*
- 6 How defendant (administrator) shall plead, when the administration is revoked and granted to another. 13 & n. (a)
- 7 Misrecital of the day of holding parliament is fatal. 19
- 8 Justification by officer of inferior court under a *distringas ad resp.* is good without averring a plaint. *ib.*
- 9 But it must shew the process returned. *ib.*
- 10 A plea of performance to debt on bond, conditioned to perform covenants in an indenture, must set forth the covenants. 20
- 11 Replication to a plea of "no award," stating that it was ready to be delivered "according to the form and effect of the condition," is bad, where the condition appoints a particular place for delivery. 22
- 12 *Actio non accrevit infra sex annos*, when a proper plea. *ib.*
- 13 On the replication to a plea by executors of judgments recovered, see tit. Executors, 8, 9.
- 14 Certainty required in a replication assigning a breach. 31
- 15 Plea amounting to general issue cannot be objected to on general demurrer. 38  
It is only matter of form. 39
- 16 Plaintiff needs not shew that which lies not within his own knowledge. *ib.*
- 17 Demurrer admits nothing but what is well pleaded. 39, 101
- 18 In a plea, justifying an entry to take tithes, defendant needs not shew *how* he is farmer of the rectory: but if he states a title by deed, he must shew the deed. 42
- 19 *De injuria sua propria* is a bad replication when defendant pleads matter of interest in another. 42  
Or justifies by title. 540
- 20 Plea of entry to take tithe needs no co-

## PLEADING.

- lour, although it contains an impertinent allegation of title to the land in a third person. 43-4
- 21 Want of colour is only cause of special demurrer. 44
- 22 Where defendants plead separately, nonsuit against one discharges both. 50
- 23 Trespass for entering plaintiff's close and taking away "his ashes" without setting forth the number: held good after verdict. *ib.*
- 24 Where the plaintiff may allege what number he pleases, the omission of number is matter of form only. *ib.*
- 25 Declaration alleges a promise by defendant to pay, "if plaintiff would make his debt appear:" averment that the plaintiff "did make it appear," without shewing *how*, is good after verdict. 53
- 26 Justification under a right of way *ad fugand' et refugand'* without saying *averia*, or any particular cattle, is bad. *ib.*
- 27 In what cases bad latin will vitiate, and when cured by an *anglice*. 54, 357, 424, 425, 429, 436, 439, 444, 446.
- 28 When the addition of *prædictus* will vitiate. 62, C. 74
- 29 In trespass for imprisoning plaintiff till he paid a sum of money, a plea justifying imprisonment by virtue of a judgment recovered for a *less* sum, is bad. 64, *see n. (b)*
- 30 In reciting a private statute, "*inter alia enactitat' est*" is insufficient. 75. *Sed vide n. ib.*
- 31 On pleading with a *per nomen*, *see* 77, 126, 157
- 32 Where the condition of a bond is plainly unlawful *primâ facie*, as to kill a man, the defendant may crave oyer and demur. But if it may or may not be lawful, as in case of maintenance, he must plead specially. 81-2
- 33 A general act of oblivion, containing an exception of several persons, must be pleaded, and the party shewn not to be within the exceptions. 84 & n. (f)
- 34 When plaintiff is to do the first act, he should aver performance. 94
- 35 A justification under a custom must contain averments to shew that the defendant's case is within it. 101
- 36 Pleading a bargain and sale "*debito modo irrotulat'*," without saying "within six months," is bad. 103
- 37 Conusance *as bailiff* of tenant for life for rent *in arrear*, is a sufficient averment of the continuance of the life, upon general demurrer. 107
- 38 A plea of release *puis darrein-continuance* must name a place where it was made. 112
- 39 The plaintiff declared on a promise by the defendant to pay money to A. B. for

## PLEADING.

- the plaintiff's use, if he did not *make it appear to* and *satisfy* the said A. B., that he had paid it before: a plea that defendant "*did make it appear to A. B.*" &c. held bad, for not shewing *how*. *Semb.* The plea would have been cured by alleging that A. B. had in fact been *satisfied*. 114
- 40 He who pleads a discharge, must shew what kind of discharge it was. 115
- 41 When a licence by bargainee for 100 years is pleaded, it is unnecessary to allege the continuance of the bargainee's estate. 120
- 42 Traverse of a bargain and sale must be *modo et forma*, without including the consideration. *ib.*
- 43 Where two matters, as a fine and warranty, are pleaded, and one only relied on, the plea is not double. 127
- 44 *Prædictus* is surplusage, where there is no previous mention of the thing. 131
- 45 The court must not be put to compute time. *ib.*
- 46 Whether a repugnant date, laid under a *scilicet*, be void? 146
- 47 After pleading performance, the defendant cannot rejoin matter in excuse of performance. 156
- 48 When a party claims a thing which cannot commence without deed, he must shew it: *secus*, if he claims only part of the thing so granted. 156 & n. (b)
- 49 After plea of performance of a covenant to pay, defendant cannot rejoin a tender. 157
- 50 In debt on a bond to perform covenants, only one breach can be assigned: *secus*, in an action of covenant. *ib.*
- 51 Judgment may be arrested, where entire damages are given, and one count is bad. 162
- 52 In declaring on a covenant contained in a deed of release, the previous lease is sufficiently pleaded by way of recital in the release, *semb.* 175
- 53 When a seisin is alleged generally, a sole seisin shall be intended. 202
- 54 Where defendant alleges a seisin in J. S. and plaintiff replies a joint seisin, he must traverse that J. S. was sole seised. *ib.*
- 55 Omission of special traverse held matter of substance. 203
- 56 In declaration for nuisance a particular statement of title is unnecessary. 206
- 57 Trespass for an assault on 1st May *anno regis*, 28; plea, *son assault demesne* on 1st May, *prædicto anno regis* 25: held that the plea was good. 212
- 58 A *quod cum* is good in Case, but bad in Trespass. 215
- 59 A place mentioned simply shall be intended a vill, unless the contrary appear. 228

## PLEADING.

- 60 When the plea agrees in *time* with the declaration, defendant needs not traverse *before and after*: but the plaintiff may vary his time. 246
- 61 Plea *puis darrein* &c. found against defendant on demurrer, is peremptory. 253
- 62 When many words of conveyance are used, the alienee may elect which way to take, and in pleading may recite all without duplicity, if he shews upon which he relies. 259 & n. (a)
- 63 Double pleading is good on general demurrer. *ib.*
- 64 A plea of local justification, varying from the place in the declaration, must traverse all places *extra* &c. 267
- 65 Plea in bar bad for omitting a venue. 268
- 66 Letters patent being pleaded as granted in the 24th year of the reign of Elizabeth, queen of England, Scotland, &c. Scotland was held surplusage. 318
- 67 In trespass for taking goods, a plea of several attachments out of an inferior court, where each goes to the whole, is double. 321
- 68 Plea and rejoinder make but one defence. 323
- 69 Plea, bad for part, is bad for the whole. 347, 466
- 70 A declaration contained an *indebitatus* count and a *computasset*; a plea of usury to the former, with an averment that both were for the same cause, held bad. 367
- 71 *Anno regis* instead of *anno regni regis*, good. 406
- 72 Plaintiff needs not recite more of a statute than makes for himself; and the misrecital of an immaterial part shall not vitiate, although he concludes *contra formam statuti predicti*. 429
- 73 A declaration entitled generally of the term, and stating a trespass after the first day of term, is bad in arrest of judgment. 434
- 74 A special verdict finding the trespass done before, would aid. *ib.*

## PLURALITY.

(See CHURCH.—QUARE IMPEDIT, 5.)

## POOR.

- 1 Forty days' residence will not give a settlement under 13 & 14 Car. 2, if there be a complaint within that time followed by a recent prosecution. 9
- 2 What shall be a reputed parish within 43 Eliz. 402
- 3 A large parish cannot be rated distinctly by the vills according to 13 & 14 Car. 2, c. 12, unless it be found to be so large that it cannot reap the benefit of 43 Eliz. 412-3
- 4 *Quere*, whether justices may tax a neighbouring vill in aid? *ib.* & n. (b)

## POWER.

- 5 A toll is rateable to the poor, though never rated time out of mind. 419
- 6 A poor man, settled at A., purchases a copyhold for life at B, worth 40s. a year; he cannot be *prevented* from removing thither, nor *compelled* to do so. 432
- 7 A pauper, who cannot be removed by reason of sickness, shall not thereby gain a settlement. 433
- 8 Whether a child shall follow the father's settlement acquired since its birth? 518
- 9 Whether marriage during the service shall prevent a settlement by hiring and service? *ib.*
- 10 Whether hiring and service as a *curate* will acquire a settlement? *ib.*

## PORTION.

(See ASSUMPSIT, 35.—MARRIAGE, 16.)

- 1 The trustees of a reversionary term, provided by settlement for raising portions, cannot sell it for that purpose during the continuance of the particular estate. 309
- 2 In such a case, the portions shall bear interest from the expiration of the particular estate. *ib.* 310
- 3 Where the revenue of the land is inadequate to the payment of the portions, trustees are compellable to sell. *ib.*

## POSSESSIO FRATRIS.

(See COPYHOLD, 2, 3.)

## POWER.

(See COPYHOLD, 23.—DEVISE, 12, 14.)

- 1 A power of revocation and new appointment by writing under the hand, &c. of the donee, is not forfeited by his attainder for high treason. 9
- 2 When a power passes to the crown by attainder. n. (a), 10
- 3 The words "usually let" in a power have two meanings: 1st, They mean repeated acts of leasing; 2dly, lands usually in demise, as under a single long lease. 23, 24
- 4 Lessor under a power must observe all the circumstances and circumscriptions of that power. 24
- 5 A *feme covert* may execute a power. 164
- 6 Whether a power to dispose by writing under hand and seal be well executed in Equity by a will without a seal? 308
- 7 Power of leasing does not extend to leases to commence *in futuro*. 342
- 8 Power to lease for lives may be executed without livery. 408
- 9 Power of revoking by writing under hand and seal is well executed by a covenant to levy a fine to new uses, and a fine levied accordingly. 411-2  
Neither covenant nor fine alone would be sufficient. 412
- 10 Where one, who has an interest and a



## POWER.

power, makes a conveyance without reference to his power, it operates out of his interest, unless a contrary intent appear.

*ib.*

11 A power may be executed by lease and release.

*ib.*

12 A power of leasing premises, consisting of land and a rectory without glebe, reserving a rent of 5s. an acre, authorizes a lease of the rectory at any rent. 413-4

13 A power of leasing given to A. and his assigns, may be well executed by the assignee of the executor of A.'s assignee. 476

14 Whether a power be well executed by a fine levied by tenant for life, and a subsequent deed declaring the uses of the fine? 486

15 Under a power to lease a manor, or any part thereof, except the demesnes, reserving the usual rent, copyholds cannot be leased; but the services may. 507

16 Where there is a power of leasing with a qualification annexed, which extends only to part of the estate, the other part may be leased without regard to the qualification. *ib.*

## PRACTICE.

(See ABATEMENT, 6.)

1 Court refused to set aside judgment entered on a warrant of attorney after the defendant's death, where he was alive on the day to which the judgment related. 75

2 Death of a party between verdict and judgment is no ground for arrest of judgment. 79

3 Outlawry may be reversed for want of proclamations, without plea or writ of error. 162

4 Damages increased by the Court on view of a mayhem. 173

5 *Feme covert* discharged from arrest in an action on a bond sealed by her. 210

6 In *Quare impedit*, the sheriff must not return fictitious summoners and mainpernors. If, in such case, the sheriff returns the defendant summoned, whereby judgment is had by default, a writ of disceit, original or judicial, lies; or the court will relieve on motion. 238-9

7 Casting an *essoin* will not preclude the defendant from alleging non summons. 239

8 An *essoin* is no appearance, but an excuse for not appearing. *ib.*

9 A judgment obtained by fraud or surprise is examinable at any distance of time. 240

10 As to mainpernors and summoners, See 238, 240

11 When plaintiff demurs to a plea *puis darrein*, &c. and defendant, being ruled to join, refuses, plaintiff may enter up judgment. 252

## PRESCRIPTION AND CUSTOM.

12 A plea *puis darrein* offered at *Ni. Pri.* must be proved there, otherwise the judge may refuse to allow it. 253

13 Plea *puis darrein* being found against defendant on demurrer, is peremptory. *ib.*

14 Plaintiff cannot reply to plea *puis darrein* before the judge of *Ni. Pri.* *ib.*

## PRECEDENCE.

(See ASSAULT AND BATTERY, 5.)

## PRESCRIPTION AND CUSTOM.

(See CHURCH, 21.—COMMON, 1, 7.—COPYHOLD, 11, 14 to 17.—CORPORATION, 1.—INFERIOR COURT, 5, 6, 13, 22, 32, 33.—JURY, 14.—PLEADING, 35.—PROHIBITION, 13, 31, 32.—STATUTES, 8, 9.—TITHES, 1, 7.—VARIANCE, 5.—WAY, 2.)

1 A prescription for the inhabitants of a manor to grind all the corn spent in their houses at the plaintiff's mill, is bad. 20, 459, 460

2 Prescription for common from the carrying away of corn till the land is resown with grain: turnips are not *grain* within the prescription. 51

3 Every custom supposes a law, and if not irrational or contradictory, is good. 64

4 Mayor and burgesses may prescribe for common of turbary for themselves and inhabitants of the borough: and new houses and inhabitants shall have the benefit of the prescription. 134-5

5 Inhabitants cannot prescribe for common in their own names. 136

6 A particular prescription may be controlled by a general custom: therefore the latter may be pleaded without a traverse of the former. But it is otherwise of inconsistent prescriptions. 210

7 Customs against common right ought to be pursued strictly. 263

8 Custom in inferior court must be stated with particularity, *semb.* 315, 318

9 A *custom* supposes an act of parliament, or equivalent law: a *prescription* supposes an original grant. 320

But a custom is not necessarily good, because parliament might have enacted it. *n. (b), ib.*

10 Whether the reparation of a quay be a sufficient consideration for a prescriptive claim of toll from ships unloading within the port? 355

11 In pleading a prescription for an easement, it must be laid in him who has the fee. 357

12 No custom can be alleged in a Court held by letters patent. 361

13 How to state a custom to grind at the plaintiff's mill. 459

That the immemorial usage must appear to have been obligatory, *ib. & n. (a)*



## PRESENTATION.

### PRESENTATION.

(See ADVOWSON.—CHURCH.—QUARE IMPEDIT, 1.)

### PRESENTMENT.

(See CHURCHWARDENS.—JURY, 13.—LEET, 1, 5.—PROHIBITION, 17.)

### PRIVILEGE.

(See ARREST, 1.—ATTORNEY, 4.—OATH, 4.)

- 1 As to privilege of cinque ports, See tit. Cinque Ports.
- 2 No privilege against the king's process. 12 & n. (a)
- 3 Liberty of the Rolls is not a privileged place as to arrests. 368
- 4 A serjeant sued jointly with another in the K. B. cannot plead his privilege; and *semb.* he has no privilege against the K. B., although he has against an inferior court. 389
- 5 Though an officer be suable by bill in his own court, yet his servant is suable by original. *ib.*
- 6 Where a privileged officer is joined as co-defendant with a stranger, he loses his privilege, unless the joinder be covenous. *ib.*

### PROBATE.

(See BISHOP, 1.—EXECUTORS, 49, 77, 79, 83.—MANDAMUS, 3.—PROHIBITION, 1, 27.)

### PROFERT.

(See BOND, 6.—PLEADING, 18, 48.—REPLEVIN, 3.)

### PROHIBITION.

(See CHURCHWARDENS, 3.—CONTEMPT, 4.—EXECUTORS, 46.—INFERIOR COURT, 17, 18.—MARRIAGE, 8.)

- 1 Prohibition refused, to stop probate *quoad* lands. 23
- 2 Suit in Ecclesiastical Court for calling one "a whore," not prohibited. 43; *contra*, 296
- 3 Suit in Ecclesiastical Court for calling one "a cuckold" not prohibited. 44
- 4 In a suit for tithes in Spiritual Court, parishioners pleaded that they were settled on another person by act of parliament: prohibition issued for refusing the plea. 67
- 5 Spiritual Court prohibited *quoad* the examination of the paternity of a bastard, but allowed to proceed *quoad* acts of fornication. 68
- 6 Spiritual Court prohibited from enforcing payment of a stipend to the curate, enlarged by the bishop's order, when there was a contract between the parties. 70
- 7 After sentence and costs assessed in the Spiritual Court, a prohibition will extend

## PROHIBITION.

- to the costs, if the court had no jurisdiction. 75
- 8 Prohibition granted without notice upon suggestion of a *modus*. 78
  - 9 No prohibition grantable after sentence, where the Spiritual Court has jurisdiction of the libel; *aliter*, where it has none. 78, See n. (a), *ib.*
  - 10 Whether a suit in the Spiritual Court for calling a person *knave*, *liar* and *rascal* shall be prohibited? 80
  - 11 Whether prohibition lies, when a proctor sues for his fees in the Spiritual Court? 113, 122
  - 12 A proctor libels for fees in the Spiritual Court and expences of journey &c. prohibition granted *quoad* all but the fees 129
  - 13 When a custom is controverted in the Spiritual Court, prohibition lies. *ib.*
  - 14 No entry is made of prohibitions denied. 171
  - 15 Prohibition denied on suggestion by the party that he was sued for alimony, and had pleaded a trust-deed for separate maintenance, which the Spiritual Court had refused to admit. 282
  - 16 A. is adjudged to be the father of a bastard at sessions; he will be prohibited from suing B. in the Ecclesiastical Court for calling him "the father of a bastard." 283
  - 17 Prohibition will issue to an ecclesiastical judge who puts any one to accuse himself on oath. *ib.*  
Or who cites any one *ex officio* without presentment. *ib.*
  - 18 Spiritual Court prohibited from examining trusts. *ib.* 284
  - 19 *Semb.* prohibition lies, when the libel in the Spiritual Court is too general. 285  
*Aliter*, if the generality be in the usual form of proceeding there. 286, C. 332; 295, C. 347
  - 20 Prohibition to the Ecclesiastical Court *quousque* they grant a copy of the libel. 287
  - 21 No prohibition in a suit against executors for dilapidation. *ib.*
  - 22 No prohibition to a suit for church rates, because they are unequal. 289
  - 23 No prohibition shall issue for irregularity in the proceedings of the Spiritual Court in a matter of spiritual cognizance. 290
  - 24 The Spiritual Courts shall not be prohibited from trying a matter determinable at common law, if it arises incidentally in a matter of spiritual cognizance: but it must be tried by the rules of common law. *ib.*
  - 25 Suit in the Spiritual Court, for mere words of heat, or general accusation, shall be prohibited. 291, 295, 297
  - 26 Whether a suit in Spiritual Court for

## PROHIBITION.

- calling an heir a *bastard* shall be prohibited? 296
- 27 No prohibition lies for granting probate of a nuncupative will not made agreeably to statute of frauds, *North, C. J. dissent.* 297
- 28 After sentence in the Ecclesiastical Court for defamation, no prohibition lies on a suggestion that the words are actionable by particular custom (as in London:) *aliter*, if the words are actionable at common law. 297  
*Semb.* the sentence will be no bar to an action on the custom in London. n. (b), *ib.*
- 29 Where a party is cited out of the proper diocese, no prohibition lies after sentence. 299
- 30 Prohibition denied to a suit in the Ecclesiastical Court for a rate to rebuild a church. *ib.*
- 31 Suit against an impropriator for the repairs of a chancel prohibited, upon suggestion of the prescriptive liability of another person. 300
- 32 Suit for a mortuary prohibited, where by custom none was due. *ib.*
- 33 Prohibition denied to a suit in the Ecclesiastical Court for words importing adultery. *ib.*

## PROTECTION.

- 1 Not allowed in case of breach of the peace, or a rule of the K. B. 359

## PUIS DARREIN CONTINUANCE.

(See AMENDMENT, 2.—PLEADING, 38, 61.—PRACTICE, 11 to 14.)

## QUARE IMPEDIT.

- 1 In a *Quare impedit*, where the defendant's clerk has been instituted and inducted, he is not an actor, and therefore needs not state a formal title, with a presentation, in himself. 34
- 2 Where the plaintiff's title is derived solely from the appendancy of an advowson to a manor, the appendancy is traversable. 34 & n. (a)
- 3 Original in *Quare impedit* not amendable as to the name of the defendant. 69
- 4 To the process in *Quare impedit*, the sheriff must not return fictitious summoners and mainpernors. 238-9
- 5 In *Quare impedit*, the patron sets forth an avoidance by accepting a second benefice. It is unnecessary to state its value, or that it had a cure of souls. *Aliter*, where the plaintiff entitles himself by lapse upon such an avoidance. 241-2
- 6 Upon issue taken on *vacavit per cessionem*, a verdict finding *quod vacavit per mortem* is for the plaintiff. 242

## RELEASE.

- 7 In *Quare impedit* for simony, the patron needs not be joined. 535

## RATE.

(See CHURCH, 15, 16, 19.—POOR, 3, 4, 5.—PROHIBITION, 22, 30.)

## RECAPTION.

- 1 Pleadings in a writ of recaption. 38-9

## RECOGNIZANCE.

(See FORGERY, 2.)

- 1 A recognizance according to the form of 23 Hen. 8, c. 6, is joint and several. 128
- 2 Recognizance cannot be taken by an officer out of court, without a special custom. 355

## RECOVERY, COMMON.

(See COPYHOLD, 4.—LEASE, 18.—MERGER, 3.)

- 1 A common recovery may be explained by the deed of bargain and sale. 240-1
- 2 A recovery may be suffered of an advowson. 241
- 3 A recovery by tenant in tail, without a good tenant to the *præcipe*, will estop all who claim under the parties; but not the issue in tail, or remainder-men. 252
- 4 Feoffment to use of B. in tail, remainder to C. in tail, &c. provided that, on failure of B.'s estate tail, D. shall have a rent out of the land: B. creates a term of 1000 years, and after levying a fine and suffering a recovery, dies without issue: held that the rent is barred by the recovery, and is not preserved during the term. 362
- 5 A recovery by tenant in tail operates by way of continuance and protraction of the estate tail. 363
- 6 Tenant in tail cannot bar charges on his own estate. 364
- 7 Recovery by tenant in fee simple is no bar to an executory devise or collateral interest, possibility, condition, covenant, &c. *ib.*
- 8 Gift in tail rendering rent, with condition of re-entry on nonpayment: a recovery by donee in tail bars the condition, but the rent remains. *ib.* & n. (c)
- 9 Charges laid on the fee before the creation of the estate tail, cannot be avoided by a recovery by tenant in tail. 365

## RELEASE.

(See BARON AND FEME, 5.—BOND, 17.—ERROR, 27.—EXECUTORS, 74.—REMAINDER, 8.)

- 1 A release in general words will be restrained by the intention of the parties. 195; 474, C. 649, n. (a)
- 2 A promise may be discharged by parol before breach, but not after. 196, 230
- 3 A release of "all debts, duties and de-

## RELEASE.

- mands" does not discharge a covenant unbroken: but the word *covenant* must be used. 235
- 4 Where the words of a release are unintentionally made too large, Equity will relieve. 302
- 5 A release of all demands does not release future arrears of rent, nor an unbroken covenant. 367
- 6 A release of *all right in the land* extinguishes rent. *ib.*
- 7 Whether a release of all demands on the testator's estate will bar an action against executor for a breach of covenant by the testator? 474; *and see n. ib.*
- 8 Mortgagor releases to mortgagee for years "all his right, title and interest in the land:" the term is thereby turned into an estate for life. 474-5
- 9 The release of one jointenant for life to another has the same effect as death, except in relation to strangers, who have incumbrances, *arguendo*. 485
- 10 A contingent interest of the wife's, which may by possibility vest during the husband's life, may be released by him. 515

## REMAINDER.

(*See COPYHOLD, 12.—DEVISE, 20, 34.—FINE, 10.—TRUST, 3.*)

- 1 No remainder can be limited after a conditional fee. 59
- 2 A remainder was limited to the settlor's *fifth son*: *quære*, whether in computing the fifth, a son, dead at the time of the settlement, should be included? 76
- 3 A. having two sons, B. & C., covenanted to stand seised to the use of B. the elder in tail male, remainder to the heirs male of himself, remainder to his own right heirs. B. died, leaving one son and several daughters: then A. died, and afterwards the grandson died without issue. Held that C. was entitled to the estate tail limited to the heirs male of the covenantor, and that he took by descent *per formam doni* from the grandson. 225
- 4 Whether a contingent remainder is destroyed by the descent of the inheritance upon the tenant of the particular estate? 405, 481
- 5 B. devised lands to three sons, and if either of them died, that the lands of the deceased should be equally divided among the survivors: held that vested cross-remainders were created by the devise. 481
- A. devised lands to his two sons and the heirs of their bodies, and if they died without issue, remainder over: held that cross-remainders were created by implication. 483-4
- 7 No cross-remainder can be raised by implication in a feoffment to uses. 484

## RENT.

- 8 Lands are settled to the use of A. & B. for their lives, remainder to first son of B. in tail, remainder to the right heirs of A.: B. before issue releases to A.: *semb.* the contingent remainder is not destroyed. *ib.*

What alteration in particular estate will destroy a contingent remainder,

*See n. (a), 485*

- 9 Under a devise to A. for life, remainder to his first son, &c., a son *in ventre matris* at A.'s death may take. 505
- 10 A right of entry will support a contingent remainder, if it exists when the contingency happens. 508
- 11 A contingent remainder, destroyed by alienation of the particular tenant, may be revived by his entry for condition broken before the vesting of the contingency. *ib.*

## RENT.

(*See ASSUMPSIT, 24.—COVENANT, 13, 17.—DEBT, 1, 2.—DISTRESS, 2, 4, 6 to 9.—EXECUTORS, 32, 33, 40, 42, 52, 53, 54, 55, 57, 59, 61, 62, 71, 75.—FINE, 7.—FRAUD, 2.—GAVELKIND, 4.—JOINTURE, 1.—LEASE, 1 to 7, 16, 17, 20, 23, 27.—RECOVERY, 4, 8.—RELEASE, 5, 6.—REFLEVIN, 1, 3, 11.*)

- 1 On the remedies for the recovery of a rent-seck. 1 & n. (b)
- 2 When the king grants over a rent-service, he cannot empower the grantee to distrain. 37-8
- 3 The heir cannot recover rent due in the lifetime of the ancestor. 37
- 4 Lessee for life leases for years, rendering rent, and then surrenders; the rent is extinct. 93
- 5 A tender of rent must be pleaded to have been made at the place appointed for payment. 149
- 6 When a termor assigns his whole term rendering rent, he may maintain debt for it, but cannot distrain. 218 & n. (a)
- 7 Whether a rent can issue out of a term of years? n. (a), 219
- 8 Lessee for years assigns to his lessor, reserving rent without deed: the reservation is *in the nature of rent*, and recoverable by action of debt, but not by distress. 398-9

Such rent is capable of apportionment in the case of a partial eviction. 399

- 9 D. fraudulently conveys to B., and then leases to C., rendering rent; B. shall have the rent. 404
- 10 Entry of lessor by consent of lessee is no suspension of rent. 405
- 11 A. leases to B. for years rendering rent; B. underleases part to C., reserving no rent; and C. assigns to A., who enters: Held that the entry of A. is no suspension

## RENT.

- of either the whole or any part of the rent payable by B. 417
- 12 Tortious entry of lessor into part suspends the whole rent. *ib.*
- 13 A rent-service may be suspended in part and *in esse* for part. 418
- 14 Where lessee leases part to his lessor, reserving no rent, there shall be an apportionment. *Per Hale, C. J.* *ib.*  
*Aliter*, if rent be reserved. *ib.*
- 15 If tenant alienes part to his lord, entire services are extinguished. *ib.*

## REPLEVIN.

(See NEW ASSIGNMENT, 2.—TENDER, 5.)

- 1 Defendant cannot avow for part of the rent, without saying that the rest is satisfied. 38 & n. (b)
- 2 An avowry, stating a title by descent, must shew *how* the avowant is heir. 42
- 3 It is not necessary to shew the deed of demise in an avowry for rent-service: *aliter*, in case of a rent-charge. 43
- 4 An avowant is an actor, and ought to shew his title. *ib.*
- 5 Where defendants plead separately in replevin, nonsuit against one before judgment discharges both. 50
- 6 When the defendant in replevin must *avow*, and when *justify*. 107
- 7 Declaration in replevin for taking sheep, must specify the sort of sheep. 121
- 8 Declaration in replevin requires greater certainty than trespass. *ib.*
- 9 Defendant in replevin may plead property in himself, and such a plea will entitle him to a return. 349, 350
- 10 Property in a stranger is pleadable in abatement only. *ibid. Sed vide n. (a)*
- 11 Defendant avows for rent-charge as bailiff to A.: a plea in bar that avowant distrained without A.'s privity, and that A., having notice, disavowed the distress, is bad. Plaintiff ought to traverse that defendant was bailiff. 535-6

## REQUEST.

(See DEMAND.)

## RESTITUTION.

(See CHURCH, 8, 9.—MARKET, 2.)

## REVERSION.

(See DEVISE, 39.—FINE, 13.—HEIR, 4, 12, 13, 14.—WARRANTY, 1, 12.)

## REVOCATION.

(See CHURCH, 9.—DEVISE, 40.—FRAUDS, STAT. OF, 9.—PARTITION, 3.—POWER, 9.—USE, 6.)

## SCANDALUM MAGNATUM.

- 1. Words are actionable in *scand. mag.* which

## SHERIFF.

- would not be so in the case of a common person. 49
- 2 If words spoken of a peer would be actionable in the case of a common person, he may elect to sue on the statute or otherwise. *ib.*
- 3 To say of a peer that "he is an unworthy man, and acts contrary to law and reason" is *scan. mag.* 222
- 4 Words spoken of a peer are actionable, though they charge no particular crime. *ib.*
- 5 The statutes of *scan. mag.* do not expressly give an action, but the party has it by operation of law. 222-3
- 6 In *scan. mag.* the defendant cannot justify, but he may explain. 223  
But see n. (c), *ibid. contra*; and *per Scroggs, J.*, Words of reproach, however general, may be justified by shewing special matter. *ib.*

## SCIENTER.

(See ACTION ON THE CASE, 12, 13, 14.)

## SCIRE FACIAS.

(See ACCORD, 1.—BAIL, 4, 8.—ERROR, 25. WALES, 1, 7.)

- 1 A general plea of non-tenure to a *sci. fa.* on a judgment in a personal action is bad. 109
- 2 A *sci. fa.* against terre-tenants upon a judgment, is not within 16 & 17 Car. 2, c. 5, which relates only to extents executed. 237
- 3 *Scire facias quare executionem*, omitting *habere non debet*, is bad, but amendable by the writ on the file. 338

## SEQUESTRATION.

(See EXECUTION, 4, 5.—TITHE, 2, 3.)

- 1 In trespass, the defendant may justify under a sequestration out of Chancery, or the Ecclesiastical Court. 232

## SERJEANT.

(See PRIVILEGE, 4.)

- 1 A serjeant, assigned to be of counsel by the court of K. B., may be committed on refusal. 389

## SEWERS.

- 1 Whether an officer can justify under a decree of commissioners of sewers which has been vacated? 435

## SHERIFF.

(See ACTION, 1.—ACTION ON CASE, 11.—ASSUMPSIT, 4.—BAIL, 1.—OFFICE, 7.—PRACTICE, 6.—QUARE IMPEDIT, 4.)

- 1 Bond for sale of the place of under-sheriff void by 5 & 6 Ed. 6. 19
- 2 Sheriff may execute an *accedas ad curiam* by his bailiff. 52, 355

## SHERIFF.

- 3 Ministerial office of sheriff is exercisable by deputy. *ib.*
- 4 Under-sheriff may make partition. 53
- 5 No action lies against the sheriff for returning *cepi corpus*, &c. when he has let the defendant out on bail. 209
- 6 An action lies against the sheriff for refusing sufficient bail. 210
- 7 No action lies against the sheriff for taking insufficient bail; but he shall be amerced till he brings in the body. 219
- 8 The goods of one indicted for felony may be inventoried by the sheriff before conviction, but not removed: and he may lawfully take security from any one, that they shall be forthcoming on conviction. 326
- 9 If sheriff of one county have a prisoner in his custody in another, he may return *non est inventus* to a *latitat* or *capias*. 416
- 10 *Semb.* a writ may be delivered to the sheriff, when he is out of his county. *ib.*
- 11 In making returns to parliamentary writs upon elections, the sheriff's office is judicial. 430. See n. (b), *ib.*

## SIMONY.

(See CHURCH, 8.—DISPENSING POWER, 11.—EVIDENCE, 4.—QUARE IMPEDIT, 7.)

- 1 The temporal and spiritual courts have concurrent jurisdiction of simony since 31 Eliz. c. 6. 84
- 2 Simony may be pardoned, but the consequent disability remains. 197
- 3 A simoniacal contract by the guardian of an infant patron will avoid the presentation. 198
- 4 A simoniacal presentation is *ipso facto* void. *ib.*

## SLANDER.

(See ACTION, 3.—BARON AND FEME, 5.—PROHIBITION, 2, 3, 10, 16, 26, 28, 33.—SCANDALUM MAGNATUM.)

- 1 Words defaming a counsellor in his profession are actionable. 14, 15
- 2 Whether words affecting a man's fame be actionable? 14 & n. (a)
- 3 Words shall be taken in *mitiori sensu*; but to a common intendment. 15 & n. (c)
- 4 Distinction between oral and written slander. n. (d), 15
- 5 To say that plaintiff "forsook himself," &c. is actionable, if the words appear to be spoken concerning a trial in a court of record. 17
- 6 Whether in such action it is necessary for the plaintiff to shew that the words spoken had reference to some *material* evidence? 18 & n. (a)
- 7 The want of introductory averments in declaration for words may be cured by defendant's justification. 18 & n. (c)
- 8 Words imputing insolvency to a trader,

## SLANDER.

- are actionable. 18
- And without special damage. 275
- 9 *Semb.* To say of a victualler that he puts lime in his ale, and that one lost his life and his eyes by drinking it, is actionable without special damage. 25
- 10 "He is a presbyterian, and designs and practises against the king and his interest:" held not actionable. 31
- 11 Words, charging a criminal intent without any indictable act done in pursuance, are not actionable. 46
- 12 Words are actionable in *Scan. Mag.* which would not be so in the case of a common person. 49
- 13 No action lies for calling a woman a whore, without special damage alleged. 50-1
- 14 But she may sue in the Spiritual Court. *ib.*
- 15 To say that A. "swore a false oath" is actionable, with a *colloquium* concerning the proof of a will before the bishop. 55
- 16 Words imputing *sacrilege* not actionable. 67
- 17 Whether it be actionable to say of a feme sole that *she was brought to bed of two boys?* 80
- 18 Slander of title is not actionable without special damage. 274
- 19 Words, charging a woman with incontinence, not actionable without special damage. *ib.*
- 20 Calling plaintiff a *witch* is not actionable. 275
- 21 Action lies for slanderous words, although defendant reported them as spoken by another, the plaintiff averring that they were not so spoken. *ib.*
- 22 Whether it be actionable to say "thou hast a bastard?" *ib.*
- 23 To say of a dyer with reference to his trade, *he is a cheating knave, for he cheated me*, is actionable. *Quare*, if the words charge him with being a *rogue?* 276
- 24 Words, imputing extortion and want of understanding to an attorney, are actionable. *ib.*
- 25 To say of a letter-carrier, *he breaks open letters and takes out bills of exchange*, not actionable without a *colloquium* of his employment, though loss of place be alleged as special damage. *ib.*
- 26 A *colloquium* of employment is unnecessary, when the words necessarily relate to it. 277
- 27 Words disparaging a midwife in her profession are actionable. *ib.* & 279
- 28 *Thou hast picked my pocket*, not actionable, unless a felony be meant. 277
- 29 Words charging *heresy* not actionable without special damage. *ib.*
- 30 To say of a dancing mistress that *she is*



## SLANDER.

- a man and got J. S. with child*, not actionable without special damage. *ib.*
- 31 Special damage, as loss of scholars, must be alleged with particularity. *ib.*
- 32 To say of plaintiff *she kept a bawdy-house* (in the past tense) is actionable. 278
- 33 *He is a great rogue and killed a man, and if he had not given money to have taken himself off, he had suffered for it*, are actionable words. *ib.*
- 34 Words not importing scandal are not actionable, though special damage be alleged. *Per North, C. J.* 279, C. 314
- 35 To say of a lawyer, *he never gives his advice, but he consults others*, actionable. *ib.*
- 36 To say of A.'s bailiff, *he is a cheating, cozening rogue, and hath cheated A. in many things*, is not actionable without special damage, or reference to his employment. *ib.*
- 37 *He is a thieving rogue, for he carried away boards and timber, &c.* is actionable. *ib.*
- 38 Words importing an evil inclination, and not an act, are not actionable. *ib. & n. (a)*
- 39 To say of a taylor, *he entered himself a prisoner in the K. B.*, not actionable without special damage. 280
- 40 To say of an officer (as a deputy lieutenant) that he is a *papist*, is actionable: *quare*, if spoken of a common person? *ib.*
- 41 Words, not actionable formerly, may become so by acquiring a worse acceptance by usage. *ib.*
- 42 To call an heir *a bastard* is actionable. 16, 296
- 43 Indictment may recite parts of a libel without setting out the whole in *hæc verba*. 456, 524
- 44 An *innuendo* shall neither enlarge, alter, nor abridge the sense of that to which it is annexed. 506
- 45 To say of one, who is a justice of the peace, deputy lieutenant, and candidate at a parliamentary election, that he is a *papist* and *pensioner*, with an averment shewing that *pensioner* means one who sells his vote, held actionable. 530-1

## SLAVE.

(See *TROVER*, 5.)

## STATUTES.

(See *DISPENSING POWER*.—*PLEADING*, 30, 72.)

- 1 The statute *de donis* has not been literally construed. 58
- 2 Where a statute declares a thing to be forbidden by God's law, it must be admitted to be so by the Courts. 171
- 3 The king's dominions *extra quatuor maria* are not governed by the laws and statutes

## TENDER.

- of England, unless it be so appointed by parliament. 175-6
- 4 Statutes remedial and beneficial may extend to things not *in esse* at the time of making them: *secus* of penal statutes. 176
- 5 The statute 1 Eliz. c. 19, of ecclesiastical leases, is a private act. 179
- 6 In the construction of a beneficial act, it is not enough to secure the intended benefit, unless it be by the ways and means prescribed by the act. 183
- 7 A law enacting an impossible thing is void. 185
- 8 Held, that statute 14 Car. 2, c. 2, regulating the choice of scavengers, destroyed the custom of choosing them in the borough of Southwark. 203
- 9 An affirmative statute, introductory of a new law, destroys inconsistent customs. *ib.*
- 10 Parliament cannot enact a thing *oppositum in objecto*. 320
- 11 Importation of gloves for the party's own use, or for giving away, is not within the stat. 3 Ed. 4, c. 4. 325-6

## STATUTE STAPLE.

(See *DEBT*, 5.—*EXECUTORS*, 10.)

## SURRENDER.

(See *DISCONTINUANCE*, 1.—*MERGER*, 2.—*OFFICE*, 2, 11.)

- 1 A surrender vests no estate in the reversioner till acceptance: and *semb.* an infant reversioner cannot accept. 502  
But see the opinion of *Ventris, J. contra*, *n. (b)*, 503
- 2 Surrender of *non compos* is merely void, and not voidable only. 508

## SURVIVORSHIP.

(See *DEVISE*, 29.—*EXECUTION*, 6.—*EXECUTORS*, 46.)

- 1 Survivor of two joint-merchants may join with the executor of the deceased in an action of goods sold. 468. *Sed vide n. ib.*  
*See* 532, C. 716, *n. (a)*

## TAIL, TENANT IN.

(See *DEVISE*, 6, 7, 38.—*DISCONTINUANCE* 1.—*FINE*, 13.—*FORFEITURE*, 1.—*JOINTURE*, 1.—*RECOVERY*.—*REMAINDER*, 3.—*USE*, 5.—*WARRANTY*.)

- 1 Charges upon an estate tail cannot be avoided by those who claim under tenant in tail; as, a recoveror, lessee according to stat. Hen. 8, or tenant by curtesy. 365

## TENDER.

(See *EXECUTION*, 8.—*RENT*, 5.)

- 1 A tender with *a tout temps prist.* cannot



## TENDER.

- be pleaded after a general imparlance: *aliter*, after a special imparlance. 205, 134
- 2 In debt on a penal bond, a plea of tender is good without an *uncore* and *tout temps prist*. 205
- 3 Tender with *tout temps prist* is pleadable after essoin. *ib.*
- 4 On a distress damage feasant, tender of amends must be made before impounding. 339, 527
- 5 Tender of amends before action brought is not pleadable in replevin. *ib. ib.*
- 6 When no place is fixed for delivery of goods to plaintiff, defendant, who pleads a tender, must shew that he first applied to plaintiff to appoint a place. 433

## TENURE.

(See USE, 3.)

- 1 The doctrine, that the same person cannot be both lord and tenant, is antiquated. 418
- 2 Lands are intended of socage tenure, unless the contrary appear. 481

## TEST ACT.

(See OFFICE, 7.)

## TITHE.

(See COSTS, 10.—PLEADING, 18, 20.—PROHIBITION, 4.)

- 1 A prescription to have all tares cut green for horses, tithe free, is good. 72
- 2 *Semb.* The tithes of lay impropriations may be sequestered by the ordinary for repairs of the chancel. 230-1
- 3 So they may be sequestered in case of non-residence, vacancy, or deprivation. *ib.*
- 4 *Indebitatus assumpsit* lies for tithes sold. 234

A parol lease of tithes for one year is good by way of sale; but a lease for a longer time must be by deed. *ib.*

- 5 Lands formerly belonging to a priory of St. John of Jerusalem are discharged of tithes. 299
- 6 The Court of Chancery has jurisdiction in matters of tithe. 303
- 7 A county, parish, or town may prescribe in a *non decimando*; but not a particular person. 317
- See note (a), *ibid.* as to the districts which are capable of a custom *de non decimando*.
- 8 Tithe of agisted cattle, if unprofitable, shall be paid by the owner of the ground; if profitable, by the owner of the cattle. 329
- 9 Tithe milk should be delivered by the parishioner at the church-porch. 329. *Sed vide n. ib.*
- 10 Of the tithe of hops, hop-poles, fuel, rakings of corn, &c. 334-5

## TRESPASS.

- 11 No tithe payable of any thing *per quod decimæ fiunt uberiores*. *ib.*
- 12 What is barren land, so as to be exempt from tithe. 335
- 13 The parson cannot justify an entry to set out tithe without consent of owner. *ib.*

## TOLLS.

(See POOR, 5.—PRESCRIPTION AND CUSTOM, 10.)

## TRADE.

- 1 Acts of parliament in restraint of trade construed strictly. 116
- Grants to encourage it, expounded largely. *ib.*

## TREASON.

- 1 Upon conviction for clipping, the judgment is to be drawn and hanged, but not quartered. 513-4
- 2 What words amount to treason. 514

## TRESPASS.

(See DISTRESS, 6.—INFERIOR COURT, 29, 30.—LICENCE, 4.—NEW ASSIGNMENT, 1, 3.—PLEADING, 18, 20, 23, 26, 29, 58, 67, 73.—SEQUESTRATION.—TITHE, 13.)

- 1 When trespass lies for an executor for cutting and carrying away corn in the lifetime of testator. 22-3 & n. (a)
- 2 Whether trespass for entering a close and cutting corn, can be laid with a *continuando*? 82-3
- 3 A trespass, improperly laid with a *continuando*, is aided by verdict. 83
- 4 In trespass for taking cattle, if defendant justifies damage-feasant, it is sufficient for the plea to allege *possession* of the close, without stating a title. 206
- 5 Plea of justification to trespass *quare cl. freg.* must set forth a title. *ib.*
- 6 In trespass for imprisoning plaintiff *till he paid 20s.* the latter words are only matter of aggravation. 323
- 7 Defendant may justify killing the plaintiff's mastiffs to prevent them from killing the defendant's hogs, though the hogs were trespassing. 347
- 8 A plea excusing a trespass by cattle from defect of fences, must shew the fences to be the plaintiff's, and the closes to be contiguous. *ib.*
- 9 Trespass for breaking fences may be laid with a *continuando*. 356
- So of walking with feet, or of eating plaintiff's grass. *ib.*
- 10 Three closes, B., G., and W., are contiguous to one another; the owner of W. is bound to maintain the fence between W. and G., and the owner of G. the fence between G. and B.;—cattle stray out of B. into G. from defect of fences, and thence into W. from a like defect: *quare*, whether the

## TRESPASS.

owner of *W.* can treat them as trespassers?

*See* 379, 380 & n. (a)

That defect of fences is only pleadable in justification by one whose cattle are lawfully in the adjoining close,

*See* n. (a), *ib.*

11 Trespass for taking plaintiff's fishes without stating the kind and number; *quare*, whether good? 407

12 Trespass lies for taking an ox-stall. 425

13 The general replication *de injuriâ*, &c. is bad, when the defendant justifies by title. 540, & *see* n. (a), *ib.*

Such replication is good after verdict.

n. (a), *ib.*

## TRIAL.

(*See* JURY, 14, 15.—MARRIAGE, 5.—WALES, 4.)

1 When a new trial is grantable in criminal causes. 5 & n. (f)

2 Mistrial aided after verdict, where the issue was tried by a jury of the county in which the action was laid. 33, 437

3 No new trial for the absence of material witnesses. 80

4 Trial in wrong county is not aided by statute of jeofails. 410

## TROVER.

1 Trover for a pair of boots and spurs, or a set of curtains and vallance, is good. 357

2 Trover and assumpsit cannot be joined. 360

3 Of the degree of certainty necessary in trover. 438, 442, 447

4 Trover lies by one tenant in common, or jointenant, against another, for destroying or actually converting the goods. 450-1

That a sale of the whole is a conversion,

*See* n. (a), *ib.*

5 Trover lies for a negro slave. 452

## TRUST.

(*See* DEED, 3.—DEVISE, 35.—LIMITATION OF ACTIONS, 8.)

1 A writ of law cannot notice a deed of trust. 282

2 Trusts not examinable in the spiritual courts. 283-4

3 A term of years was limited in trust for A. for life, and on A.'s death the trustees were to assign all their right, title, and interest to the issue of A., and for default of such issue, to B.: *quare*, whether, on A.'s death, his issue had the trust of the whole term, and so the remainder over was void; or whether the issue had only the trust for life? 306

## USE.

(*See* FINE, 6.—GAVELKIND, 5.—MARRIAGE, 3.—REMAINDER, 7.—WARRANTY, 5, 18.)

1 A reservation of a pepper-corn on a lease

## VARIANCE.

for years is a sufficient consideration to transfer the possession by stat. uses, and to make the lessee capable of a release before entry, although the words "bargain and sell" are not used in the lease. 249, 250

2 The value of a consideration to raise an use is not material. 251

3 Tenure alone is a sufficient consideration to keep an use from resulting. *ib.* & n. (c)

4 A bargain and sale of lands, in consideration of articles of agreement, will not raise an use: *secus*, if it be in pursuance of a covenant to convey in consideration of money. 344

5 A. seised in fee, covenanted to stand seised to the use of the heirs male of his body by his second wife: held that A. took an estate for life by implication, and that the estate tail became executed in him. 369, 370

6 An use is revocable by bargain and sale without enrolment. 408

7 If A. covenants to stand seised to the use of his son after his (A.'s) death, this makes A. tenant for life. But if it be after the death of a stranger, A. continues seised in fee. 461

8 When the intent is plain to pass an estate by conveyance at common law, no use shall arise. 470

9 *Cestui que use* can have no advantage of an estoppel in the deed of feoffment to uses. 475

## USURY.

(*See* PLEADING, 70.)

1 A bond for payment of legal interest is not void because the obligee afterwards takes more; but he is liable to an information. 253

2 Where an agreement is made usurious by the mistake of the scrivener, it is not void. *ib.*

3 To a plea of usury *quod corrupte agreeatum fuit* to pay more than lawful interest, a replication *quod non corrupte agreeatum fuit* is good. 264

## VARIANCE.

(*See* BAIL, 2, 3.)

1 Misrecital of day of holding the parliament, fatal. 19

2 What variance in the description of the plea will avoid a bail-bond. 105

3 The obligation was for *quatuorcentum li.* and the declaration was *quadringent' li.* held no variance. 105, and *see* 261, 358, 425

4 Matter of aggravation, inserted in the count in trespass, will not make it variant from the writ. 323

5 Declaration stating a prescription for payment of a duty *per alienigenas* is support-

## VARIANCE.

ed by proof of a prescription *tam pro indigenis quam alienigenis*. 401

## VENIRE.

(See ERROR, 3, 5, 10, 12, 13, 15.)

## VENUE.

- 1 The sheriff of A. outlaws plaintiff after a *supersedeas* to the *exigent*, and plaintiff is taken on a *cap. utlag.* in county B., an action lies against the sheriff, which may be laid in A., or B., or in the county where the record lies. 6
- 2 In case against the coroners of the county Palatine of Lancaster for a false return to *cap. utlag.*, the venue may be in Middlesex. 191
- 3 The venue changed in an action of debt for rent between lessor and lessee. 260
- 4 Venue not changed in an action for an escape. *ib.*
- 5 A *ward* is a good venue, especially if alleged to be within a vill. 318
- 6 Venue cannot be changed after plea; nor when an attorney lays a transitory action in Middlesex. 426

## VERDICT.

(See JURY.)

## WAGER.

- 1 A. lays a wager with B. that two men were hanged for cutting D.'s face *and nothing else*, and it is found that they were attainted and hanged upon an indictment for *setting upon D. vi et armis et per insidias* and cutting her face: A. is the winner. 268
- 2 A stakeholder must take notice at his peril who wins the wager. *ib.*
- 3 No action lies on a wager, that defendant would beat a third person. 433

## WAGER OF LAW.

(See PERJURY, 3.)

- 1 In debt on a judgment in a court-baron, the defendant may wage his law. 213  
The wager of law in such a case is admitted on the supposition that the money recovered has been paid.  
*ib.*; *Sed vide n. (b), ib.*
- 2 *Semb.* Where a debt appears and the defendant refuses to say whether he has paid it or not, the court may require special compurgators. *ib.*

## WALES.

- 1 Whether a *sci' fa'* against terre-tenants issues into Wales? 109, 146
- 2 Writs of execution run into Wales, but not original writs. 110. *Sed vide n. (b)*

## WARRANTY.

- 3 Since 27 Hen. 8, laws made in England extend to Wales without naming it. 147
- 4 Of the jurisdiction of English courts over Wales, and of trials in the next English counties. 147
- 5 Whether a *capias utlagatum* lies out of England into Wales? *ib.* & n. (d)
- 6 Counties palatine distinguished from Wales. *ib.*
- 7 A *scire facias* issues into Wales upon a judgment of the Courts at Westminster. 173

## WAR.

(See ALIEN, 1, 2, 5.)

- 1 Every one is bound to take notice of a war; and no formal declaration of it is requisite. 41

## WARDEN OF FLEET.

(See BOND, 13.—ESCAPE, 4.)

## WARRANT.

(See CONSTABLE, 1.)

- 1 An arrest on the 6th November may be justified by a warrant sealed and delivered on the 6th, though it bears date the 7th. 271
- 2 An officer is not subject to an action for executing irregular process of a justice, if it be in a matter within his jurisdiction: as in case of a distress warrant for a highway rate issued without previous summons or notice. 396, 490, 491
- 3 When a justice of the peace issues a warrant on the information of an officer, the officer only is liable, if the information be untrue. 491-2

## WARRANTY.

- 1 Whether the warranty of tenant in tail without assets will rebut an heir from claiming the reversion? 56
- 2 Feoffment with warranty to the use of the feoffor for life, remainder to use of A. for life, remainder to use of right heirs of feoffor: *quare*, whether A. can use this warranty by way of rebutter? *ib.*
- 3 Warranty is a covenant real annexed to a freehold. If annexed to a chattel, it is but a personal covenant. 57
- 4 The reason of the doctrine of collateral warranty. 59 & n. (c)
- 5 *Cestui que use* may rebut, for he comes in not merely in the *post*, but by limitation of the party. 59
- 6 All warranties barred at common law, except those commencing by disseisin. *ib.*
- 7 Distinction of lineal and collateral warranties unknown at common law. *ib.*
- 8 Tenant in tail may bar a remainder by warranty without assets. *ib.*

## WARRANTY.

- 9 Warranty of ancestor, not being tenant in tail, will bar the issue without assets. 30, 60
- 10 Warranties are not expressly, but impliedly, restrained by stat. *de donis*. 60
- 11 Tenant cannot rebut by reason of possession alone, but must convey the warranty to himself. 61
- 12 The warranty of any person but the donee, descending upon the reversioner, will bar him. 62
- 13 A *feme covert*, having an estate tail with remainder in fee to her sisters, joined her husband in levying a fine with warranty against both of them and the heirs of the *feme*, to the use of both for their lives, with remainder to the heirs of the husband. The *feme* died without issue, leaving her sisters heirs. Held, 1st. That the warranty of the husband was extinguished by taking back an estate for life:  
2dly, That the warranty of the *feme* descended to her heirs during her husband's life:  
3dly, That he might use it to rebut her heirs (the sisters) in a formedon. 157
- 14 If the owner of land and a stranger join in a warranty, both are bound. *Per Vaughan, C. J.* 158
- 15 Where the warrantor takes back as large an estate as that which he warranted, his warranty is extinct. 159
- 16 Where several are bound to warrant lands, the tenant must vouch all; but where one is demandant, he shall be rebutted for the whole. *ib.*
- 17 Where a warranty descends on an infant or *feme covert*, it shall not bind, if their entry be lawful. *ib.*
- 18 *Cestui que use* may take advantage of a warranty by way of rebutter. 188
- 19 None but privies in estate can vouch or have a *warrantia charta*. But an abator, intruder, &c. may rebut. *ib.*
- 20 A condition not to rebut, annexed to a warranty, is void. *ib.*

## WRITS.

- 21 A warranty takes away a right of entry, as well as of action, when it descends on one of full age. 189
- 22 In the conveyance of freeholds, *dedi* makes a warranty. 414

## WASTE.

(See *BARON AND FEME*, 7.  
*COPYHOLD*, 24, 25.)

## WAY.

(See *COVENANT*, 7.)

- 1 J. S., being seised of two contiguous acres, A. and B., builds a house in B. and lays pipes to convey water from a pool in A. to the house in B. A. and B. being afterwards aliened separately, the alienee of B. has no right of way over A. to fetch water from the pool for the use of the house, when the pipes are stopped. 140
- 2 A private way by prescription to a certain close shall not be used for carrying hay, which grew on another close. 247

## WILL.

(See *DEVISE.—EXECUTORS.—FRAUDS*,  
*STATUTE OF.—PROHIBITION* 27.)

## WILL, ESTATE AT.

(See *DISSEISIN*, 4, 6.—*LEASE*, 7 to 10, 30.)

## WITNESS.

(See *OATH*, 7.—*FRAUDS, STATUTE OF*, 4.—*TRIAL*, 3.)

## WORDS.

(See *SLANDER.—SCAN. MAG.*)

## WRITS.

- 1 The execution of writs often varies from the literal direction of them. 53
- 2 The king's mandatory writs, not remedial, issue into every part of the dominions of the crown. 147 & n. (c)

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